Standard of Review on Judicial Review or Appeal

A Background Paper

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Preface

This background paper is one of several to be released as part of the Administrative Justice Project. The Project, initiated by the Attorney General, is a broad legal and policy review of the system of administrative justice in British Columbia. Its objectives are to ensure that:

- administrative agencies meet the needs of the people they serve;
- their administrative processes are open and transparent;
- their mandates are modern and relevant;
- government fulfills its obligations by providing the legislative and policy framework administrative agencies require to carry out their independent mandates effectively.

The Terms of Reference for the background papers are to ensure that:

- legislation is based, to the greatest extent possible, on a principled, consistent and clear articulation of the role and powers of administrative agencies;
- administrative agencies possess the procedural authority to respond flexibly, effectively and efficiently to resolve disputes by adjudicative or other means;
- compelling rationales exist for more than one "layer" of administrative appeal or review;
- courts and parties have clearer direction regarding the legislature's intention concerning matters such as the standard of review where a decision is challenged on judicial review or appeals.

The intent of this and the other background papers is to facilitate informed discussion about steps government can take to assist the work of administrative agencies. The papers provide a focus for this discussion and, it is hoped, will result in dialogue and debate within the administrative justice community. Comment will be taken into account by the Administrative Justice Project when it drafts a White Paper for release in early 2002. There will be a further opportunity for public input after the White Paper is released, before government decides on what steps it will take.

The author of this paper wishes to recognize the capable editorial assistance provided by Mr. Robin Junger. Responsibility for any errors or omissions of course lies solely with the author.

If the reader is interested, written comments may be forwarded to the author at the following address prior to March 15, 2002.

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EXECUTIVE SUMMARY

British Columbians affected by the decisions of administrative tribunals have the right to apply to challenge those decisions in court. Such challenges usually arise in one of two ways. A person may exercise the constitutional right of judicial review in Supreme Court. Alternatively, a statute may give a person a specific right to appeal the tribunal's decision to a provincial superior court. Each method of challenging an administrative tribunal's decision has the same purpose: to convince a court that it should intervene on the basis of an "error" made by the tribunal.

The moment that an allegation of tribunal error is made in court, the court must come to grips what the law describes as the proper standard of review from the tribunal's decision. The inquiry into the proper standard of review on judicial review or appeal requires the court to ask itself this very fundamental question: "what is the court's proper role in reviewing the tribunal's decision, based on the error that has been alleged?" There are, broadly speaking, two possible answers to this question, giving rise to a judicial choice that may make a very significant difference to the outcome of the case before the court:

1. The tribunal's decision should be upheld only if the court agrees with it.

2. The tribunal's decision should receive deference from the court, and should not be interfered with unless the court concludes that it is unreasonable.

This discussion paper examines the law governing how courts on judicial review or appeal select the proper standard of review and apply that standard to the decisions of administrative tribunals. It confirms the widely shared observation that Canadian administrative law regarding the standard of review is very complex. After examining the Canadian law's complexity and its causes, this paper summarizes the administrative law of England and the United States regarding the standard of review. Following this comparative review, the final section of this paper asks readers to consider whether and how comprehensive legislative reform on this important subject might be achieved in the interests of greater certainty and economy.

Four key law reform themes emerge from this paper. The first is that the "pragmatic and functional" approach that courts presently apply in selecting the proper standard of review from the merits of tribunal decisions carries significant conceptual and practical difficulties. These difficulties tend to cause confusion, expense, inconsistency and uncertainty for parties and courts, especially where legislation is silent or ambiguous about the proper standard of review. Second, while two potential outcomes of the pragmatic and functional approach – i.e., the "correctness"

test and "patently unreasonable" test - offer relatively clear review standards, legitimate questions arise about how desirable it is for courts devote extensive analytical effort seeking to define and apply "intermediate" standards of review given the realities of judicial decision-making.

Third, and consistent with the Supreme Court of Canada's repeated emphasis that "legislative intent" is the central issue in selecting the proper standard of review, legislators have significant room to express their intention regarding the proper standard of review more often, more clearly, and more creatively than they do now. Fourth, while law reform, and especially attempts to legislate deference, will not eliminate the complication arising from the constitutional principle that tribunals cannot be totally immunized from judicial review, the law is generally simpler and easier to apply where legislation is clear – as for example, where it includes a full privative clause on one hand, or invites correctness review on legal questions on the other.

To determine whether law reform in this area is a worthy undertaking, it is necessary to consider the possibilities for reform. Should the legislature generally favour curial deference on all questions, or should it legislate "correctness" review on legal questions? Should it take one general approach on appeal, and another on judicial review? Should legislators be even more specific and legislate, on a tribunal-by-tribunal basis, different standards of review for different types of questions? Does the attempt to legislate the standard of review risk undesirable simplification, or the substitution of one set of analytical problems for another?

As this paper will show, the proper standard of review from administrative tribunal decisions, particularly with regard to questions of law, has been a hotly debated topic both inside and outside the courtroom. It raises fundamental questions about the proper balance between finality and accountability in tribunal decision-making and about the proper institutional relationship between administrative tribunals and courts.

This paper does not propose specific recommendations. It does, however, outline a set of reform alternatives with a view to eliciting discussion and debate by interested persons about the desirability and content of possible law reform. Persons and organizations commenting on this paper are invited to direct their comments to the Administrative Justice Project. These comments will be taken into account by the Project in preparing a White Paper setting out specific proposals and recommendations for government consideration.

Table of Contents

"Administrative law is not for sissies"[1]

Hon. Antonin Scalia, United States Supreme Court

1 OVERVIEW

The degree of complexity in the Canadian law regarding the standard of review is such that readers not fully acquainted with the jurisprudence may risk losing sight of "forest for trees". It will therefore be useful to begin by orienting the reader to the subject of administrative law, and to the context in which the "standard of review" issue discussed in this paper arises.

The body of law that we call "administrative law" is concerned with the legal principles governing persons and bodies exercising "governmental" or "public" power in relation to the citizen. This power is exercised primarily pursuant to legislation, the work product of the democratic process.[2]

Over the past five decades, administrative law has assumed much greater prominence in Canada. Its increased prominence is the by-product of the expanding role that government itself has played in Western countries following the Second World War. The following passage from a Supreme Court of Canada judgment nicely emphasizes the ubiquitousness of regulation in modern society:

> *It is difficult to think of an aspect of our lives that is not regulated for our benefit and for the protection of society as a whole. From cradle to grave, we are protected by regulations; they apply to the doctors attending our entry to the world and to the morticians present at our departure. Every day, from waking to sleeping, we profit from regulatory measures which we often take for granted. On rising, we use various forms of energy whose safe distribution and use are governed by regulation. The trains, buses and other vehicles that get us to work are regulated for our safety. The food we eat and beverages we drink are subject to regulation for the protection of our health.*[3]

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1 Hon. Antonin Scalia "Judicial Deference to Administrative Interpretations of Law" (1989) Duke L. J. 511 at p. 511.

2 I say "primarily" concerned, because the vast majority of administrative law cases concern persons exercising a statutory power. While this is a useful definition for purposes of this paper, it should be noted that the province of administrative law extends beyond persons exercising statutory powers, to officials such as ministers exercising common law "public" functions, and even private bodies acting without legislative underpinning but regarded as making a "public" decision: see *R. v. Panel on Take-overs and Mergers*, [1987] 1 Q.B. 815 (C.A.). For an extremely useful discussion of the outer boundaries of administrative law, see Groberman, "Administrative Law and Non-Statutory Bodies", *Administrative Law (1998*), Continuing Legal Education, ch. 6.1.

3 *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at para. 136, per Cory J.

Regulation, and the use of public power it entails, has many faces. Public power is exercised by courts of law. It is exercised by ministers of the Crown and by officials within their ministries. It is exercised by local governments. It is exercised by self-regulatory bodies.

While the province of administrative law extends to all these bodies, this paper's attention focuses specifically on a group of entities that are neither ministers of the Crown nor courts; neither local governments nor Crown ministry officials. They are entities that are variously described as "independent administrative agencies", "administrative boards" and "administrative tribunals".[4] The Administrative Justice Project refers to them as "administrative justice agencies", and describes them as follows:

> *Administrative justice agencies provide specialized forums for decision making and dispute resolution that are separate from day-to-day operations of government ministries. Like the courts, administrative agencies are expected to be impartial and fair. As an alternative to the courts, they are also expected to be more accessible, less costly and more able to reach a decision in a timely and effective manner.*[5]

Administrative tribunals have been defined as "distinctive institutions of the welfare state" that typically share four characteristics:

- They enjoy a measure of independence from the government department with overall responsibility for the policy area in which they operate. This means, at the very least, that the minister cannot direct their decision-making, and in turn is not politically accountable for their decisions under traditional principles of "responsible government".
- They are specialized: they are associated with one or more specific public programs, usually within a single statute.
- They are meant to be effective and typically operate at the "sharp end" of the administrative process: that is, at the point where the program is applied to the individual.

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4 The "administrative tribunals" of particular concern in this paper are those tribunals that are part of the government's administrative justice project review, which are primarily "independent administrative tribunals": Terms of Reference, Schedules 1 and 2. This said, it is recognized that many of the matters discussed in this paper may have application to reform prospects for other legislative delegates, including Crown decision-makers, self-governing professions and local governments. While this paper may provide a helpful framework for the reforming the law regarding the standard of review in those areas, each of them raise unique policy considerations that may, for some, speak in favour of a different answer to the law reform questions posed in this paper.

5 Administrative Justice Project, *Terms of Reference*, July 27, 2001.

- Their functions typically include making decisions that are sufficiently serious and specific in relation to the citizen as to attract the common law duty of procedural fairness.[6]

The public policy areas served by administrative tribunals are nearly as broad as those of government itself. As the Supreme Court of Canada has recognized: "In Canada, boards are a way of life. Boards and the functions they fulfill are legion."[7]

For the great breadth of modern administrative law, its roots run just as deep. Administrative law is the inevitable by-product of the Rule of Law, and two transcendent ideals it encompasses: (1) that those exercising public authority must act, and must be allowed to act, within the scope of their grant of authority; and (2) that where public power is directed toward the citizen, decision-makers must generally act in a fashion that is procedurally fair. These ideals are not judicial inventions. They are not matters only for lawyers. They represent a fundamental societal ethic. This is why the articulation, realization and reconciliation of these ideals have spawned significant debate both inside and outside the courtroom.[8]

Nowhere do the tensions inherent in giving meaning to the "rule of law" come into sharper focus than in real life cases where parties prevail upon courts to interfere with decisions rendered by administrative tribunals. The vast majority of court challenges to administrative tribunal decisions arise on judicial review and statutory appeal. For a petitioner or an appellant in such a proceeding, the argument will be made that the tribunal has rendered a decision tainted by some sort of "error" that demands correction by the court.

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6 See generally, Evans, Janisch, Mullan and Risk, *Administrative Law* (4th ed, 1995), pp. 12-20.

7 *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at para. 17.

8 For a useful summary of the competing tensions in this area, see Chief Justice McLachlin's Paper: "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999), 12 C.J.A.L.P. 171. The ongoing debate about how "the Rule of Law" should be defined and articulated might cause some readers to wonder whether it really is a notion worthy of being called a "fundamental societal ethic". To this legitimate question, one might respond first with the insight of Lord Reid, whose comments about the notion of "natural justice" apply equally well to the Rule of Law: "In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist": *Ridge v. Baldwin*, [1963] 2 All E.R. 66, Lord Reid at p. 71. In addition, it may be suggested that the Rule of Law is probably subject to such intense discussion precisely because its "primary colours" are fundamental and well-established; the debate is usually around the importance of each colour, what kind of picture to paint, and how to paint it.

The moment an allegation of tribunal error is made in court, the "standard of review" question arises for the court. It is a question that the court must ask itself – a question that may be stated with deceptive simplicity: "What is my role here?"

The law regarding the standard of review may be thought of as a very elaborate answer to that very simple question. In considering the law, and the options for law reform discussed below, this paper seeks to ask the following questions:

- Why does the inquiry into the standard of review arise at all?
- What is the law in Canada regarding how courts should determine and apply the standard of review regarding administrative tribunal decisions?
- Is the present state of the law sufficiently certain, workable and predictable?
- What are the underlying principles and competing tensions that inform the law?
- To what extent do the court decisions actually respect the intention of the Legislature regarding the standard of review, and what are the implications of this for law reform?
- Can we learn anything from how English and American courts address this problem?
- To what extent do different standards of review actually affect oversight decisions of tribunals by courts in real life cases?
- Should the law be reformed, and if so what reform options are available?
- If reform is appropriate, how should British Columbia legislators answer the policy question whether or to what extent courts ought to grant deference to questions of law decided by administrative tribunals?

2 THE STANDARD OF REVIEW

At its root, the inquiry into the standard of review in Canadian administrative law is about determining the threshold for "error" about which a court on judicial review or statutory appeal must be satisfied before it may quash or reverse an administrative tribunal's decision.

While the standard of review issue necessarily arises whenever a court is asked to review a tribunal decision, the specific focus of this paper is on the standard of review as it applies to the branch of law concerned with alleged *substantive* error by tribunals: what have been called errors

of "fact", "law" and "discretion". Procedural fairness questions give rise to their own method of analysis, which from a "standard of review" perspective, is more straightforward.[9]

Canadian administrative law has grown to recognize a series of "standards of review" for alleged substantive error by administrative tribunals, each of which articulates a different degree of judicial tolerance for that which the court might regard as "error" on the part of the administrative tribunal. The most deferential standard of review is the "patently unreasonable" test, pursuant to which only a "clearly irrational" decision may be disturbed by the court.[10] The least deferential standard is the "correctness" standard, which entitles the court to disturb a tribunal's decision based merely on disagreement with the tribunal.[11] The "reasonableness *simpliciter*" test has been announced as an "intermediate" standard of review, that entitles a court to disturb an administrative tribunal's decision if it is "clearly wrong".[12] Each of these "standards of review" will be described further below.

The need to determine and apply the proper standard of review is inescapable in any legal system charging one decision-maker with the responsibility of reviewing the decisions of another

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9 As this paper will show, the greatest complexity in the law regarding the standard of review flows from the difficulties in applying the "pragmatic and functional approach" to alleged *substantive* errors by administrative tribunals. The "pragmatic and functional approach" has not, to date, been applied to alleged errors of procedural fairness. This is principally because procedural fairness questions have been defined as being "jurisdictional" in nature, and because no one seriously questions the Courts' historic role to ensure that tribunals accord citizens due process. This does not mean that courts will not give some leeway to tribunals in defining what is fair in the circumstances. In this sense, there is room for discussion about "deference" to tribunal procedures. However, both courts and scholars have implicitly recognized that the "pragmatic and functional" approach was never designed for that discussion. See for example *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, where the Court clearly distinguished between the principles applicable to the "procedural fairness" and "abuse of discretion" aspects of the case. The matter may have been summarized best by Jones and de Villars, *Principles of Administrative Law* (1999, 3rd ed), at pp. 513-14: "Neither the 'correctness' test nor the 'patently unreasonable' test really fits this ground of judicial review… Perhaps the better way to look at this question is to articulate a separate test for judicial review of alleged breaches of natural justice: namely, would a reasonable person, reasonably knowledgeable about the facts, reasonably perceive the process to be unfair?…. The language of natural justice is simply different from the language of 'correctness' or 'reasonableness' or any points between. This implies that there is a different dimension applicable to this ground of review".

10 *Canada (Attorney General) v. Public Service Alliance of Canada* (1993), 101 D.L.R. (4th) 673 (S.C.C.) at p. 690.

11 *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890.

12 *Canada (Director of Investigation and Research) v. Southam* (1997), 144 D.L.R. (4th) 1 (S.C.C.) at pp. 19-22.

decision-maker. Whenever an administrative tribunal's decision is challenged in court on judicial review or statutory appeal, the court must explicitly or implicitly ask itself these sorts of fundamental questions about its proper role in scrutinizing the challenged decision in light of the error alleged:

- Is it the court's job to step into the tribunal's shoes and uphold the decision only if the court "agrees" with decision, or would the court be overstepping its proper role to ask what decision it would have made in place of the tribunal?
- Should the court "defer" to the tribunal's decision even if the court might have come to a different conclusion?
- If the judicial deference is appropriate, what are the "tolerance limits" for such deference before judicial intervention is justified?

On judicial review and statutory appeals to courts, lawyers spend a great deal of their client's money, and the court's time, addressing the standard of review. They do so because they understand that decisions identified as being entitled to significant curial deference are generally at lower risk of being disturbed than decisions to which the court finds that no deference is owed. The answer to the standard of review question may therefore make a very significant difference to the outcome of litigation.

3 WHY DOES THE INQUIRY INTO THE STANDARD OF REVIEW ARISE AT ALL?

Parties who take issue with the decisions of administrative tribunals are sometimes surprised to learn that courts even hesitate to determine whether the challenged decision was "correct". After all, courts are courts. Administrative tribunals are not.[13] And so the client may ask legal counsel: "Isn't it the job of the courts to make sure that administrative tribunals do not make mistakes"?

[13] As a matter of function, the dividing line between courts and administrative tribunals is, of course, not as sharp as it is sometimes made out to be, particularly in the cases of adjudicative tribunals, some of which even deal with constitutionally protected interests. This said, the Supreme Court of Canada has recently confirmed that, as a matter of institutional characterization, administrative tribunals are not properly regarded as part of the judiciary: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para. 24: "Administrative tribunals [in contrast to superior and provincial courts] lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it

Legal counsel who has been asked this very natural and simple question is in the business of what Oliver Wendell Holmes described as "the prediction of the incidence of the public force through the instrumentality of the courts"[14]. The lawyer's prediction about when the "instrumentality of the courts" will intervene to disturb the administrative tribunal's decision need not be perfectly certain. To return to Holmes again: "certainty generally is illusion, and repose is not the destiny of man".[15] And yet if law is not to become a wholly arbitrary and cynical exercise in which there is never repose, the lawyer should be able to offer the client a principled and useful risk prediction upon which the client can decide whether to expend the financial and emotional resources attendant on litigation. The inability to provide a principled and useful prediction for the client at all, or without great time and cost being incurred, becomes an adverse reflection either on the lawyer, or on the law itself.

Appeal courts, trial judges and the standard of review

The diligent lawyer advising such a client may begin by noting that the proper standard of review to be used by a "higher" decision-maker on review of the decision of a "lower" decision-maker is not an issue confined to administrative law. Determining the standard of review is a fundamental, threshold question in any circumstance where one decision-maker is charged with reviewing the decisions of another. Whether or not the legislature has clearly spoken to the matter, the issue must be confronted by the reviewing body.

The point can be illustrated by examining the role that appellate courts play in hearing appeals from decisions of trial judges. The British Columbia Court of Appeal derives its authority from the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, which on its face grants the Court of Appeal very broad powers in civil appeals.[16] Notwithstanding the apparent breadth of sections 6 and 9 of the *Court of Appeal Act*, the courts themselves have, as a matter of judicial policy, characterized the

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> is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected."

14 Holmes, "The Path of the Law" (1897) 10 Harv. L. Rev. 457 at p. 457.

15 *Ibid*, p. 466.

16 By combination of ss. 6 and 9 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, there is no limit on the issues that may be appealed, or the remedies the Court of Appeal may grant. It has the power to "draw inferences of fact" (s. 9(2)) and may "exercise any original jurisdiction that may be necessary or incidental to the hearing or determination of the appeal": s. 9(3). The *Act* contains no legislative statement of deference to findings of fact or exercises of discretion. Such constraints are the product of judicial policy.

proper appellate role in reviewing decisions of trial judges in civil cases as being "narrow": *Van de Perre v. Edwards*, [2001] S.C.J. No. 60 at para. 11.

All lawyers know, of course, that the primary function of courts of appeal in criminal and civil cases is to ensure that trial judges correctly state and apply the law. For a court of appeal to tolerate "error" by trial judges on legal questions would defeat the purpose of creating a court whose job it is to pronounce upon the general law with authority and finality. Thus, on questions of law, trial courts receive no deference from courts of appeal; the standard of review is "correctness". Where, however, the appeal is from a finding of fact or the exercise of discretion by a trial judge, matters are not so straightforward.

On questions of fact, appellate courts apply a "deferential" standard of review from the findings of trial judges. As concisely stated in *Tremblay v. MacLauchlan*, [2001] B.C.J. No. 1403 (Q.L.) at para. 13:

> *This being in part an appeal against the learned trial judge's assessment of the evidence, it is, perhaps, useful to state the obvious: the standard of review on issues of law is correctness; on findings of fact this Court may only interfere with the trial judge's conclusions if there is shown to be a palpable or overriding error, that is, the trial judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence or has drawn erroneous conclusions from it: Stein v. The "Kathy K", [1976] 2 S.C.R. 802; Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [1994] 1 S.C.R. 114.*[17]

Appellate deference to a trial court's findings of fact does not require a privative clause. In our system of law, the trial judge or jury is assigned the role of trier of fact. The trier of fact sees the witnesses and hears the evidence. The Court of Appeal does not, except in exceptional cases, receive direct evidence. As a matter of institutional purpose and design, the Court of Appeal is not in a position to apply a "correctness" test to factual findings based on *viva voce* evidence. Nor do the interests of finality make it desirable to design a judicial appellate process designed to "replay" the fact-finding exercise over again.[18]

Respect for the special role and structure of each court, and the interests in finality, are evident even in cases where, for example, "credibility" is not in issue. Thus, appellate deference is

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17 See also *Brimacombe v. Mathews*, [2001] B.C.J. No. 538 (C.A.) at para. 236: "The finding of facts and the drawing of conclusions from those facts is primarily the province of the trial judge, not that of the Court of Appeal".

18 This is of course in contrast to administrative appeal tribunals, whose very design and purpose is frequently to conduct rehearings or hearings *de novo* from the decisions of first instance decision-makers: see generally Evans, Janisch, Mullan and Risk, *Administrative Law* (4th ed), p. 609.

accorded to a lower court's findings of fact even where the lower court's findings, and the inferences drawn from them, are based on affidavit evidence, or on credible but conflicting expert testimony. In the latter instance, the "principle of non-intervention" does not apply with the same force, but this does not "change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact….": *Toneguzzo-Norvell v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at p. 122. As to the former, it is open to the Court of Appeal to draw all reasonable inferences from affidavit evidence submitted at first instance, but "this Court will not interfere with the findings of a chambers judge unless they are shown to be clearly wrong, or could not reasonably be supported by the evidence": *Coast Wire Rope & Supply Ltd. (Trustee of) v. Trans Pacific Hardwarre Inc.*, [1999] B.C.J. No. 748 (C.A.) at para. 11.

The exercise of discretion by trial judges is also entitled to deference by Courts of Appeal. In *Co. Ce. Fin (Receiver of) v. Yorkton Securities Inc.*, [1999] B.C.J. No. 2978 (C.A.), at para 16, the standard of review was stated as follows:

> *This Court will not substitute its discretion for the discretion already exercised by a chambers judge unless it reaches the clear conclusion that the discretion has been wrongly exercised in that no sufficient weight has been given to relevant considerations or that it appears that the decision may result in an injustice.*

Even in custody cases, where the best interests of a child are at stake, the standard of review is deferential. In *Van de Perre v. Edwards*, [2001] S.C.J. No. 60 at paras. 13-15, the Supreme Court of Canada held as follows:

> *It is clear from this case that it is necessary for this Court to state explicitly that the scope of appellate review does not change because of the type of case on appeal….*
>
> *[T]he approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial… [A]n omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.*

Nor are questions about the standard of review confined to civil appeals. Consider section 687(1) of the *Criminal Code*, which specifically authorizes Courts of Appeal to consider the fitness of a

criminal sentence and, in that context, to vary the sentence within the limits prescribed by law.[19] On its face, this section appears to authorize Courts of Appeal to engage in a reasonably exacting assessment of the correctness of the sentencing judge's decision. However, in *R. v. MacDonnell*, [1997] 1 S.C.R. 948,[20] the Supreme Court of Canada specifically rejected such an approach to sentencing appeals:

> *… the sentencing judge has had the benefit of presiding over the trial of the offender [and] will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both Shropshire and this instance), the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community….*
>
> *[A] court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.*

The situations described above demonstrate that even in the context of appeals to judges from the decisions of other judges – and despite legislative language that may appear to invite a broad appellate role – appeal courts have found it necessary to address and define the standard of review. In doing so, the courts have managed to articulate a relatively clear set of judicially created "standard of review" principles. These principles preserve the Court of Appeal's specialized role in ensuring that trial judges correctly state the law, while giving appellate deference to trial judges on fact-finding, and the exercise of discretion. Appellate deference is granted in these latter areas in recognition of the advantages of trial courts in hearing witnesses, but also in recognition of the specialized role of trial courts and the interests of finality in litigation.

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19 Section 687 of the Criminal Code provides as follows: "687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive, (*a*) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or (*b*) dismiss the appeal."

20 Quoting *R. v. Shropshire*, [1995] 4 S.C.R. 227.

That appellate justices may differ in the application of these principles is not necessarily an indictment of the principles themselves. As with any set of general principles applied by human beings to an infinite variety of fact situations, there will always be room for argument about their application in individual instances. The fundamental point is that the "standard of review" principles applicable to appellate review of courts, by courts, are well-established, accessible and reasonably predictable.

In contrast to the situation that prevails in Canadian administrative law, the appellate jurisprudence does not – apart from the leading cases - disclose that parties and courts are spending an inordinate amount of time in each appeal labouring over the threshold question of the proper standard of review of trial courts. In general, the standard of review is clear, and as a result, the Appeal Court, and the parties, can get on with business.

4 WHAT IS THE PRESENT LAW IN CANADA REGARDING THE STANDARD OF REVIEW OF THE MERITS OF TRIBUNAL DECISIONS?

Determining the appropriate standard of review is conceptually necessary because review cannot be undertaken until the reviewing body properly identifies its role. It is practically necessary because the outcome of litigation may be significantly affected by the standard of review applied. The fundamental importance of the issue would, ideally, commend as clear a statement as possible in Canadian law regarding how to ascertain and apply the proper standard of review.

And yet it is undeniably true that the law governing the standard of review of administrative tribunals by courts on judicial review and appeal is very complex - much more complex than the law governing the standard of review of trial courts by appellate courts.

Over the past twenty years, the administrative law bar has witnessed numerous attempts by the Supreme Court of Canada to synthesize, and re-synthesize, a set of principles to help lower courts determine and apply the standard of review. These efforts have arisen in cases involving a wide variety of statutory provisions and legislative settings. They have involved fact patterns eliciting varying degrees of sympathy from individual judges. They have challenged the traditional supremacy of courts in assigning the "correct" legal construction to public statutes. And they have implicated fundamental questions as to the function and expertise of administrative tribunals, the proper supervisory role of the courts and the nature of "error" in legal reasoning.

Given the nature of these factors, to be discussed in further detail below, it should come as no surprise that the law governing the standard of review did not emerge neatly, simply and immediately. Whether the solution need be as complex as it has become in Canada is, however, another question. To appreciate the degree of complexity in which we find ourselves today, and the possibilities for legislative reform in this area, it will be useful to begin by summarizing the principles of orthodoxy as they relate to determining the appropriate standard of review in administrative law in Canada.

The general framework

In *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, the court referred to its 1998 judgment in *Pushpanathan v. Canada (Minister of Citizenship and Immigration),* [1998] 1 S.C.R. 982, as having "summarized the recent jurisprudence of the court on the standards of review to provide a framework for easy reference by judges and lawyers…."[21]

Pushpanathan holds that the central issue for a court of law in determining the proper standard of review of a question of fact, law or discretion is the legislative intent of the statute creating the tribunal whose decision is being reviewed. More specifically, the reviewing court must ask itself: "was the question which the provision raises one that was intended by the legislators to be left to the exclusive jurisdiction of the Board?"[22]

Courts are required to divine legislative intent on this question according to a "nuanced" approach, dubbed the "pragmatic and functional approach". This approach requires the court to weigh several factors, none of which is dispositive, and each of which provides an "indication" falling on a "spectrum" regarding the proper level of deference to be shown to the decision in question. The "spectrum" has a "more exacting end" and a "more deferential end"; it includes the standards of "correctness", "reasonableness *simpliciter*" and the "patently unreasonable" test.[23] The pragmatic and functional analysis must be applied to each particular provision being invoked and interpreted by the tribunal; some provisions within the same *Act* may require greater curial deference than others.[24]

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21 *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 at para. 17.

22 *Ibid*, para. 26.

23 *Ibid*, para. 27.

24 *Ibid*, para. 28.

There are four sets of factors to be taken into account in determining the proper standard of review for a particular decision:

- Privative clauses: The presence of a full privative clause is compelling evidence that the court ought to defer to the decision unless other factors strongly indicate the contrary as regards the particular determination in question. A "partial or equivocal privative clause" merely "fits into the overall process of evaluation of factors to determine the legislator's intended level of deference". A clause permitting appeals generally suggests a more searching standard of review, but this factor is not conclusive.25
- Relative expertise: This factor, described in Southam as "the most important of the factors that a court must consider in settling on the standard of review", requires the court to consider three factors: the expertise of the tribunal (in the sense of the specialized knowledge, special procedure, or non-judicial means of implementing the Act), the expertise of the court relative to that of the tribunal, and the specific issue before the tribunal relative to that expertise. Once a broad relative expertise on the part of the tribunal has been established, the court may show considerable deference even in cases of highly generalized statutory interpretation of the tribunal's enabling statute.26
- Purpose of the Act as a whole, and the provision in particular: courts are more likely to exercise restraint where a tribunal's purpose in general, and the specific decision under review, reflect the "polycentricity principle". Polycentric issues involve a large number of interlocking and interacting interests and considerations, and contrast with "judicial procedure" which is premised on the "bipolar opposition of parties". Decisions where this factor is prominent include sectors such as economic management. Polycentric issues also arise for tribunals that exercise a protective, proactive and policy development role, and which apply legal principles that are "open textured" or involve a "multi-factored balancing test". Polycentric statutes are conceived not as establishing rights and entitlements, but rather as a delicate balancing between different constituencies. In a "polycentric" dispute, the appropriateness of court supervision diminishes. 27
- Question of law or question of fact: Without an express or implied legislative intent to the contrary as manifested in the three criteria above, legislatures should be assumed to

25 *Ibid*, paras. 30-31.

26 *Ibid*, paras. 32-34.

27 *Ibid*, para. 36.

have left highly generalized propositions of law to the courts. However:

- while there is merit in the distinction between fact and law, the distinction is not always clear;
- the "correct" interpretation of a term may be dictated by the board's mandate and its own coherent jurisprudence. In some cases even if courts do not agree, the integrity of certain administrative processes may demand that deference be shown; and
- even pure questions of law may be granted wide deference where other factors suggest such a legislative intent.

Where the court is hearing an appeal or judicial review from the exercise of discretion by an administrative tribunal, it must, in addition to the factors above, also consider "the amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made. The spectrum of standards of review can incorporate the principle that, in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament": *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 55.

Does the present law really give effect to legislative intent?

As noted above, the Supreme Court of Canada has repeatedly emphasized that the "central issue" in determining the standard of review is the intent of the legislator on the question. Since the focus of this paper is to examine options to help clarify legislative intent regarding the standard of review, it will be useful to more closely examine the law as it developed where legislatures have attempted to express their intent clearly: for example, by enacting full privative clauses on the one hand, and rights of appeal on the other.

Full privative clauses

A "full privative clause" is a provision, usually in the enabling statute, expressly declaring that the decisions of the administrative tribunal in question are "final and conclusive".[28] As a matter of

[28] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* (1998), 160 D.L.R. (4th) 193 (S.C.C.) at p. 210: "A full privative clause is 'one that declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded'… Unless there is some contrary indication in the privative clause itself, actually using the words 'final and conclusive' is sufficient, but other words might suffice if equally explicit….".

plain meaning, full privative clauses purport to completely insulate the tribunal from any form of judicial review or appeal.[29] This, in fact, was the very purpose of many traditional full privative clauses which, particularly in British Columbia and Quebec, sought to rely on legislative supremacy to assert that the tribunal, not the court, ought to have the "last word" on all questions arising under the protected statute. An article of the era put the matter rather bluntly:

> *There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and who is well-aware of the effect upon the purpose of various alternate interpretations. There is no reason to believe that a legally trained judge is better qualified to determine the existence or sufficiency or appropriateness of evidence on a given point than a trained economist or engineer, an arbitrator selected by the parties, or simply an experienced tribunal member who decides such cases day in and day out. There is no reason to believe that a judge whose entire professional life has been spent dealing with disputes one by one should possess an aptitude for issues which arise often because an administrative system dealing with cases in volume has been designed to strike an appropriate balance between efficiency and effective rights of participation.*[30]

However, in *Crevier v. A.G. Quebec* (1981), 127 D.L.R. (3d) 1 (S.C.C.), the Supreme Court of Canada issued its landmark ruling that any clause purporting to totally immunize an administrative tribunal from judicial review would be inconsistent with s. 96 of the *Constitution Act, 1867*. The court held that full privative clauses, while effective in limiting judicial review, must be "read down" to recognize the inherent role of provincial superior courts in ensuring that a statutory delegate does not commit *jurisdictional error*:

> *There may be differences of opinion as to what are questions of jurisdiction but, in my lexicon, they rise above and are different from errors of law, whether involving statutory construction or evidentiary or other matters. It is now unquestioned that privative clauses may, when properly framed, effectively oust judicial review on questions of law and, indeed, on other issues not touching jurisdiction. However, given that s. 96 is in the British North America Act, 1867 and that it would make a mockery of it to treat it in non-functional terms as if it were a mere appointing power, I can think of nothing more the hallmark of a*

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29 Particularly in labour statutes, the "final and conclusive" language is taken even further. This provision, from s. 22(2) of the Saskatchewan *Workers' Compensation Act* under consideration in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board),* [1997] 2 S.C.R. 890, is typical: "The decision and finding of the board under this *Act* upon all questions of fact and law are final and conclusive and no proceedings by or before the board shall be restrained by injunction, prohibition or other proceeding or removable by *certiorari* or otherwise in any court."

30 Arthurs, "Protection Against Judicial Review" (1983), 43 R du B 277 at p. 289, cited in *National Corn Growers Assn v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, per Wilson J.

> *Superior Court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review.*[31]

For law reform purposes, it follows from *Crevier* that legislators do have substantial latitude to insulate tribunal decisions from judicial review. However, this latitude is subject to the constitutional limitation that such legislation may not oust the courts from determining "the limits of [a tribunal's] jurisdiction."

It has been observed that "thinking about jurisdiction [is like] attempting to extract oneself from fly-paper: once you get started with the exercise it is virtually impossible to break free".[32] As will be noted below, English courts have held that it is so pointless to try and distinguish between "jurisdictional" and "non-jurisdictional" questions that the only solution is to regard all questions of law as "jurisdictional".

The Supreme Court of Canada has, however, taken a different approach. It has held that "jurisdictional error" will be present with regard to legal questions when the administrative tribunal (a) incorrectly interprets a legislative provision "limiting the tribunal's powers"; or (b) is "patently unreasonable" in answering a question "within jurisdiction".[33] As stated by the Court in 1995:

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31 *Crevier*, at pp. 14-15 (D.L.R.). Only 3 years earlier, Dickson J. (as he then was) expressed the matter as follows in *Jacmain v. A.G.C.*, [1978] 2 S.C.R. 15 at p. 29: "The intractable difficulty is this. It is hard to believe that a legislature would create a tribunal with a limited jurisdiction and yet bestow upon such tribunal an unlimited power to determine the extent of its jurisdiction." The same principle was more recently captured by Le Bel J., for the Court, in *Noel v. Societe d'energie de la Baie James* (2001), 202 D.L.R. (4th) 1 (S.C.C.) at para. 27: "Under the constitutional arrangements that prevail in Canada, each province has a superior court whose members are appointed under s. 96 of the *Constitution Act, 1867*. That court is the cornerstone of the Canadian judicial system. It has what has been characterized as a "core" jurisdiction, which cannot be removed from it by the provincial legislatures. (See *MacMillan Bloedel Ltd. v. Simpson,* [1995] 4 S.C.R. 725 at p. 740, 130 D.L.R. (4th) 385, Lamer C.J.C.) Among the essential powers reserved for a superior court, as a court of general jurisdiction, is the judicial review of lower tribunals and administrative bodies. While that power may be circumscribed, it cannot be totally removed from the Superior Court or transferred to another body. (See *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220 at p. 235, 127 D.L.R. (3d) 1; *Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board of Quebec*, [1953] 2 S.C.R. 140 at p. 155, [1953] 4 D.L.R. 161; *Quebec (Attorney General) v. Farrah,* [1978] 2 S.C.R. 638, 86 D.L.R. (3d) 161; *Séminaire de Chicoutimi v. Chicoutimi (City)*, [1973] S.C.R. 681, 27 D.L.R. (3d) 356 sub nom. *Seminary of Chicoutimi v. Quebec (Attorney General*).

32 Wade MacLauchlan, "Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?" (1986), 36 U of T L.J. 313 at footnote 3.

33 Pasiechnyk v. Saskatchewan (Workers' Compensation Board), [1997] 2 S.C.R. 890 at paras. 16-18: "If the conclusion is that a full privative clause applies, then the decision of the tribunal is only reviewable if it is patently unreasonable or the tribunal has made an

> *Generally speaking, where the tribunal whose decision is under review is protected by a privative clause, its decision is subject to review on a standard of patent unreasonableness. However, this is only true so long as the tribunal has not committed a jurisdictional error. Jurisdictional questions addressed by the tribunal are independently reviewed on a correctness standard. An error on such a jurisdictional question will result in the entire decision of a tribunal being set aside.*[34]

In *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, the court held that questions limiting a tribunal's jurisdiction are to be identified by focusing on legislative intent. That intent is to be gleaned using what, for the first time in Canadian administrative law, was described as a "pragmatic and functional analysis". As articulated by Beetz J., for the court, the "pragmatic and functional analysis" - which bears many striking similarities to the approach suggested by Professor Wade MacLauchlan in a 1986 law review article[35] - requires an examination of the following factors:

> *. . . not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.*

The "pragmatic and functional approach" thus did not originate as a general test applicable to judicial review and appeal. Rather, it was an effort to provide courts with a less "formalistic" method for identifying "jurisdictional" issues in their ongoing attempt to reconcile legislative efforts to completely insulate certain tribunals from judicial review with the courts' constitutional role as expressed in *Crevier*.

The Supreme Court of Canada's insistence that "legislative intent" is the touchstone for correctness review in the face of a full privative clause has been confusing for courts and

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error in the interpretation of a legislative provision limiting the tribunal's powers. In either circumstance the tribunal will have exceeded its jurisdiction. These principles are summarized in U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, at p. 1086: 'It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error: 1 If the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review; 2 If however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.'" See also Canada (Director of Investigation and Research) v. Southam Inc. (1997), 144 D.L.R. (4th) 1 (S.C.C.) at p. 19, "[t]he standard of patent unreasonableness is principally a jurisdictional test".

34 Canadian Broadcasting Corp. v. Canada (Labour Relations Board), [1995] 1 S.C.R. 157 at p. 178.

legislators. As a matter of legislative intent, a full privative clause states the matter clearly and generally – the tribunal's decision is "final and conclusive" - there shall be no judicial review. As Mr. Justice Frankfurter once put it in the American context "One need not italicize 'final' to make final mean final".[36]

Where a court identifies a question as "jurisdictional" in the face of a full privative clause, it is in truth asserting a transcendent constitutional review role despite legislative intent. Such an assertion of judicial power is entirely legitimate, but it can create a frustrating "feedback loop" to tell parties and lower courts that the only way to identify a "jurisdictional" question in the face of a full privative clause is to search for an implicit or "secondary" legislative intent that directly contradicts the plain language of the privative clause. For his part, Professor Wade makes no bones about the fact, in England, judicial review in the face of a full privative clause is not the fulfillment of legislative intent, but plain and simple "disobedience to Parliament" - a disobedience of which he approves.[37]

Rather than create a test whose premise invites tail-chasing, or which seeks to attribute to the legislator a second but contradictory "legislative intent" that is "issue-specific",[38] it may be more straightforward simply return to *Crevier* and ask whether the question before the Court is so fundamental that it rises above a mere question of law, such that the tribunal's failure to answer it correctly would offend the Constitution. While one might well answer this question using some of the "factors" contained in the pragmatic and functional approach, the inquiry's premise would have greater validity, and would probably result in questions being identified as "jurisdictional" less frequently than is risked by the present test.

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35 MacLauchlan, note xxii, *supra*.

36 Quoted in Schwartz, "*Anisminic* and Activism: Preclusion Provisions in English Administrative Law" (1985) Admin. L.R. 33 at p. 39.

37 Wade, H.R.W., "Beyond the Law: A British Innovation in Judicial Review" (1991), 43 Admin. L. Rev. 559 at p. 564.

38 No decision of the Supreme Court of Canada has ever sought to explain how a test that purports to focus on legislative intent should be used as the litmus test to override the clear legislative intent expressed in the plain words of a privative clause. However, in a November 1, 1998 speech given by Chief Justice McLachlin to the British Columbia Council of Administrative Tribunals, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 C.J.A.L.P. 171 at pp. 176-78, the Chief Justice implied that the solution lies in understanding that there are "two intentions" at work – one expressed in the legislation, and a second which the Courts attribute to the legislator who "cannot have intended to give the board an untrammeled authority to set its own jurisdiction". Even if it were true that the legislator actually had "dual intentions" in the face of a full privative clause, the problem still arises as to which "intention" should prevail

All this said, it is comforting to observe that where a full privative clause exists, Canadian courts have generally sought to put aside these theoretical difficulties and heeded the wise caution given by Dickson J. in the famous *CUPE* decision:

> *The question of what is and is not jurisdictional is often very difficult to determine. The Courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.*[39]

As more recently stated in *International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd.:*

> *There were very sound reasons for the establishment of labour boards and the protection of their decisions by broad privative clauses. Parliament and provincial legislatures have clearly indicated that decisions of these boards on matters within their jurisdiction should be final and binding. The courts could all too easily usurp the role of these boards by characterizing the empowering legislation according them authority as jurisdiction limiting provisions which would require their decisions to be correct in the opinion of the court. Quite simply, courts should exercise deferential caution in their assessment of the jurisdiction of labour boards and be slow to find an absence or excess of jurisdiction.*[40]

From a law reform standpoint, these statements are important because they demonstrate that, despite the Court's more recent announcement that the pragmatic and functional approach is to be applied generally, the presence of a full privative clause continues to carry significant weight in assisting to provide certainty with respect to determining and resolving the standard of review. As recently noted by Professor Wade MacLauchlan "The most frequently mentioned criterion affecting the standard of review is whether the challenged decision is protected by a privative clause….".[41] In the face of a full privative clause, there is a practical presumption that deference is to be granted on all questions, including questions of law. This will not prevent courts from continuing to struggle with the "pragmatic and functional" approach in difficult cases where a party asserts correctness review in the face of a full privative clause.[42] In practice, however, and as

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in a given situation. Clearly, in this context, the branding of error as "jurisdictional" has much more to do with judicial policy than with legislative intent.

39 *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.* (1979), 97 D.L.R. (3d) 417 (S.C.C.) at p. 13 (Q.L.). This passage has been quoted in more than 80 cases since 1979. For recent British Columbia cases see *White Spot Ltd. v. British Columbia (Labour Relations Board)*, [1999] B.C.J. No. 296 (C.A.); *Western Canada Wilderness Committee v. British Columbia (Chief Forester)*, [1998] B.C.J. No. 808 (C.A.).

40 [1996] 2 S.C.R. 432 at para. 26.

41 MacLauchlan, Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada (2001), 80 Can. Bar Rev. 281 at p. 291.

42 Cases on which the Supreme Court of Canada has split in identifying "jurisdictional error" include *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R.

compared to situations where there is no privative clause, a full privative clause tends to make arguments about the proper standard of review less frequent, less time-consuming and less focused on "degrees" of deference which seem to make little difference in the final results of cases.[43] It allows judges to get on with business in the fashion succinctly described by Southin J.A. in a recent case:

> *It has been said, correctly, that the standard here is one of patent unreasonableness. To my mind the practical way to address that standard is first to look at the section in issue, then to read the decisions in issue of the Labour Relations Board and finally to ask oneself if anything leaps out that indicates a lack of reason. Nothing leapt out here…. Nothing leaps out at me from the Board's decision or its reconsideration that indicates that there is any lack of proper appreciation for what it is that the Labour Board is about.*[44]

Rights of appeal to court from administrative tribunal decisions

From the perspective of legislative intent, a statutory right of appeal has traditionally been regarded as the "flipside" of a full privative clause. Until 1989, the law was clear that the creation of a special right of appeal on a question of law is to be taken as a clear legislative statement that, at least as regards legal questions, the proper standard of review is always correctness, just as the law has always been with respect to appellate review of trial court decisions.[45] The logic of that position was compelling: judicial review is always available in any event, and so – consistent

614; *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890. There are, of course, many cases in which they have been unanimous on the proper standard of review in the face of a full privative clause, demonstrating that, overall, the standard of review is more of a problem when the legislation contains no privative provisions.

43 For a sample of recent British Columbia decisions supporting this point, see *Canadian Airlines International Ltd. v. Canadian Air Line Pilots Assn.*, [1997] B.C.J. No. 1652 (C.A.); *PCL Constructors Pacific Inc. v. International Union of Operating Engineers, Local 115*, [2000] B.C.J. No. 1252 (S.C.); *Eamor v. Air Canada Ltd.*, [1998] B.C.J. No. 1357 (S.C.); *Yee v. British Columbia (Workers' Compensation Board)*, [2000] B.C.J. No. 1482 (S.C.); *Greyhound Canada Transportation Corp. v. Brzozowski*, [1999] B.C.J. No. 2032 (S.C.); *Office and Professional Employees' International Union, Local 378 v. British Columbia (Labour Relations Board)*, [2001] B.C.J. No. 1385 (C.A.); *Alivand v. British Columbia (Workers' Compensation Board)*, [2000] B.C.J. No. 454 (S.C.); *D. Hall & Associates Ltd. v. British Columbia (Director of Employment Standards)*, [2001] B.C.J. No. 1142 (S.C.); see also the Supreme Court of Canada's recent decision in *Ivanhoe Inc. v. UFCW, Local 500*, 2001 SCC 47.

44 *Office and Professional Employees Union, Local 378 v. British Columbia (Labour Relations Board),* [2001] B.C.J. No. 1385 (C.A.) at paras. 28-29.

45 In his article, "The Supreme Court of Canada and Tribunals" (2001), 80 Can. Bar Rev. 399 at pp. 417-18, David Mullan suggests that, from an historical perspective, curial

with the principle that legislators do not legislate unnecessarily - the creation of a statutory right of appeal to the court was taken as evidencing a legislative intention in favour of a more proactive judicial role than would take place on judicial review.

However, in 1989 the Supreme Court of Canada held in *Bell Canada v. Canada (C.R.T.C.)*[46] that even on a statutory appeal on questions of law, the court is entitled to apply a form of "discretionary" curial deference to the legal interpretations of specialized administrative tribunals on questions that fall squarely within their area of expertise. With the court's decisions in *Pezim* (1994)[47] and *Southam* (1997)[48], the law on this point became firmly ensconced. As noted above, the presence of a right of appeal is now simply one factor in the "pragmatic and functional approach".

In his 1997 Paper: "Judicial Review – No Clearer Now Than it Ever Was", Mr. Justice Vancise commented on the question whether the court's decisions were consistent with legislative intent:

> *One has to wonder what happened to legislative intent. Where does one find the primary consideration referred to in Bibeault that the intention of the legislature will ultimately decide the issue….*
>
> *If a primary consideration in the pragmatic and functional approach of Bibeault is to determine the intention of the legislature, surely the lack of protection of the decision from judicial review is a critical indication of who should decide the matter, the tribunal, even a specialized one, or the courts….*[49]

It is therefore the case today that, just as courts reserve the right not to grant curial deference on legal questions despite the express terms of a full privative clause, they reserve the right to grant curial deference on legal questions despite the express terms of a full right of appeal. As noted by Justice Vancise, this is an unusual result indeed for an approach whose litmus test is said to be "legislative intent".

In contrast to the situation with a privative clause – where legislation is subject the Constitution – legislators have greater latitude to assist courts, and to either confirm or negate the notion of

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deference on statutory appeals is not particularly unusual. However, the cases cited by Mullan refer to deference from discretionary decisions that do not involve points of law.

46 [1989] 1 S.C.R. 1722.

47 *Pezim v. B.C. (Superintendent of Brokers),* [1994] 2 S.C.R. 557.

48 *Canada (Director of Investigation and Research) v. Southam Inc*., [1997] 1 S.C.R. 748.

49 Hon. W.J. Vancise, "Judicial Review: No Clearer now than it ever Was" (June 1, 1997), prepared for Canadian Council of Administrative Tribunals, at pp. 30-31.

"deference" on statutory appeals. Legislators have a number of options, which include (a) specifying that, where it has granted a right of appeal, the standard of review is correctness for questions of law, or (b) abolishing the right of appeal and creating a privative clause where the Legislature is satisfied that the tribunal is in fact an expert tribunal deserving of deference.

Applying the standard of review: What standards of review are potential products of the pragmatic and functional approach?

The administrative law decisions of the Supreme Court of Canada have identified three specific standards of review. Before proceeding further with the discussion, it will be useful to outline those standards as they have been articulated by the court:

"Correctness"

The correctness test is the most "exacting" standard of review. A court applying the "correctness" test is entitled to reverse the decision in question on the simple basis that the court disagrees with the tribunal on the point in issue.

The "patently unreasonable" test

The "patently unreasonable" test is the most "deferential" standard of review in Canadian law. It is most commonly applied in the case of administrative tribunals whose decisions are protected by full privative clauses. The Supreme Court of Canada has described this test as follows in two commonly cited passages:

> *It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet the test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary, "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational.... Not acting in accordance with reason or good sense." Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.....*[50]
>
> *The patently unreasonable error test is the pivot on which judicial deference rests. As it relates to matters within the specialized jurisdiction of an administrative body protected by a privative clause, this standard of review has a specific purpose: ensuring that review of the correctness of an administrative*

[50] *Canada (Attorney General) v. Public Service Alliance of Canada* (1993), 101 D.L.R. (4th) 673 (S.C.C.) at pp. 690-91.

> *interpretation does not serve, as it has in the past, as a screen for intervention based on the merits of a given decision. The process by which this standard of review has progressively been accepted by courts of law cannot be separated from the contemporary principle of curial deference, which is, in turn, closely linked with the development of extensive administrative justice (see Cory J.'s reasons in PSAC No. 1 and PSAC No. 2, supra, and National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324 (per Wilson J.)). Substituting one's opinion for that of an administrative tribunal in order to develop one's own interpretation of a legislative provision eliminates its decision-making autonomy and special expertise. Since such intervention occurs in circumstances where the legislature has determined that the administrative tribunal is the one in the best position to rule on the disputed decision, it risks, at the same time, thwarting the original intention of the legislature. For the purposes of judicial review, statutory interpretation has ceased to be a necessarily "exact" science and this Court has, again recently, confirmed the rule of curial deference set forth for the first time in Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp….*[51]

The "reasonableness *simpliciter*" test

This standard was first identified in *Southam*, and has particular application in a context such as statutory appeal where the legislation gives indications both "for" and "against" deference on a particular question. It was defined and distinguished from the other two standards; for present purposes, it is worthy of quotation in full:

> *I conclude that the third standard should be whether the decision of the Tribunal is unreasonable. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.*
>
> *The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in Canada*

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[51] *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles),* [1993] 2 S.C.R. 756; See also: *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.* (1993), 102 D.L.R. (4th) 402 (S.C.C.) ["*Bradco Construction*"] at p. 418: "Once it has been determined that curial deference to a particular decision of a tribunal is appropriate, the tribunal has the right to be wrong, regardless of how many reviewing judges may disagree with the decision".

> *(Attorney General) v. Public Service Alliance of Canada, [1993] 1 S.C.R. 941, at p. 963, "[i]n the Shorter Oxford English Dictionary `patently', an adverb, is defined as `openly, evidently, clearly'". This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem…. But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident….*
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> > *The standard of reasonableness simpliciter is also closely akin to the standard that this Court has said should be applied in reviewing findings of fact by trial judges. In Stein v. "Kathy K" (The Ship), [1976] 2 S.C.R. 802, at p. 806, Ritchie J. described the standard in the following terms:*
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> *. . . the accepted approach of a court of appeal is to test the findings [of fact] made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view of the balance of probability. [Emphasis added.]*
>
> > *Even as a matter of semantics, the closeness of the "clearly wrong" test to the standard of reasonableness simpliciter is obvious. It is true that many things are wrong that are not unreasonable; but when "clearly" is added to "wrong", the meaning is brought much nearer to that of "unreasonable". Consequently, the clearly wrong test represents a striking out from the correctness test in the direction of deference. But the clearly wrong test does not go so far as the standard of patent unreasonableness. For if many things are wrong that are not unreasonable, then many things are clearly wrong that are not patently unreasonable (on the assumption that "clearly" and "patently" are close synonyms). It follows, then, that the clearly wrong test, like the standard of reasonableness simpliciter, falls on the continuum between correctness and the standard of patent unreasonableness. Because the clearly wrong test is familiar to Canadian judges, it may serve as a guide to them in applying the standard of reasonableness simpliciter.*

Other standards of review

While the Supreme Court of Canada's decisions have only sought to define to three standards of review, a number of lower courts have taken note of the Court's repeated reference to a "nuanced" approach, which results in a "range" or "spectrum" of review standards. In a recent British Columbia decision, Bauman J. referred to the three standards above as "major signposts".[52] The Newfoundland Court of Appeal recently stated that "There may well be other,

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[52] See *Baker v. Canada*, *supra*. See also the thoughtful comment of Bauman J. in *International Forest Products Ltd. v. British Columbia (Forest Appeals Commission)*, [1998] B.C.J. No. 1314 (S.C.) at para. 39: "One concludes that the number of "standards" on the spectrum is theoretically infinite but that, practically, we require major signposts marking credibly distinctive standards."

as yet unarticulated, standards."[53]

From time to time since *Southam*, lower courts applying the "pragmatic and functional approach" have in fact sought to articulate other standards of review. In one case, the Alberta Court of Appeal held that it would not intervene on a particular question decided by an Assessment Appeal Board absent a "*nearly* patently unreasonable error".[54] The British Columbia Court of Appeal recently introduced the concept of "correctness with appropriate deference".[55] For its part, the Federal Court of Appeal has stated that there exists "a fourth standard of review that falls between reasonableness *simpliciter* and patent unreasonableness…"[56]

5 DIFFICULTIES ARISING FROM THE ANALYTICAL APPROACH TO DETERMINING THE STANDARD OF REVIEW IN CANADIAN ADMINISTRATIVE LAW

The "framework" for the pragmatic and functional approach summarized in *Pushpanathan* - which approach the court in *Baker v. Canada* subsequently announced also extends to determining the standard of review from exercise of discretion by administrative tribunals[57] - occupies seven pages in the Dominion Law Reports.[58] The requirement to carefully review and apply these pages in each case would of course be a small price to pay if they allowed counsel and judges to efficiently and predictably resolve the standard of review in cases arising before them.

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53 *Osmond v. Newfoundland (Workers' Compensation Commission)*, [2001] N.J. No. 211 (Newf. C.A.) at para. 79.

54 See *Rickard Realty Advisors Inc. v. The City of Calgary* (1998), 216 A.R. 271 (C.A.) at p. 276.

55 *Northwood Inc. v. British Columbia (Forest Practices Board)*, [2001] B.C.J. No. 365 (C.A.) at paras. 35-38.

56 *British Columbia (Vegetable Marketing Commission) v. Washington Potato and Onion Assn.*, [1997] F.C.J. No. 1543 (C.A.). The full passage, at para. 3, reads as follows: "It follows that there is a fourth standard of review that falls between reasonableness simpliciter and patent unreasonableness which is reserved for those cases where a decision has been rendered by an expert tribunal on an issue within its field or expertise and has arrived at a higher Court by way of application for judicial review. This fourth standard of review requires more deference to a tribunal's findings than that given to expert tribunals containing a statutory right of appeal but slightly less deference than that given to tribunals protected by a true privative clause.

57 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 52-55.

58 (1998), 160 D.L.R. (4th) 193 (S.C.C.) at pp. 209-215.

However, a review of case law in the three years since *Pushpanathan* was decided tends to support the view that significant amounts of time and resources continue to be expended preparing for and arguing about what the proper standard of review should be, particularly where the enabling legislation does not contain a full privative clause. While there is not always a direct correlation between the intensity of argument on a point and its treatment in judicial reasons,[59] the jurisprudence both in British Columbia[60] and in other provinces[61] does not support the conclusion that *Pushpanathan* has clarified or simplified matters for parties, counsel and courts. In general, determining the proper standard of review remains the subject of much greater time and expense than is incurred on the same issue in civil or criminal appeals, or in administrative law cases where there is a full privative clause. As neatly summed up by the Ontario Divisional Court in a recent case:

> *Identifying the particular standard of review to be applied in any given case is not a simple matter. The standard may be different not only from one tribunal to another, but also for different kinds of decisions by the same tribunal.*[62]

As Professor Wade MacLauchlan has recently stated: "…it is apparent from the continuing volume of judicial review cases that parties who are not happy with an administrative tribunal

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59 See for example *Canadian Union of Postal Workers v. Canada Post Corp*., [2001] B.C.J. No. 680 (C.A.) at para. 13: " Much time at the hearing of this appeal was spent on the appropriate review standard". However, the Court went on to address the matter quite succinctly.

60 For a sample of British Columbia cases, see *Al Stober Construction Ltd. v. Long*, [2001] B.C.J. No. 1086 (S.C.) (14 QL pp. to determine standard of review), *Beazer East, Inc. v. British Columbia (Environmental Appeal Board)*, [2000] B.C.J. No. 2358 (S.C.) (18 QL pp. to determine standard of review); *Northwood Inc. v. British Columbia (Forest Practices Board)*, [2001] B.C.J. No. 365 (C.A.) (12 QL pages to determine standard of review); *Casson v. British Columbia College of Teachers*, [2000] B.C.J. 1038 (S.C.) (12 QL pages to determine standard of review]; *Aquasource Ltd. v. British Columbia (Information and Privacy Commission)*, [1998] B.C.J. No. 1927 (C.A.) (13 QL pages to determine standard of review).

61 *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2001] O.J. No. 3323 (C.A.); *Runnymede Development Corporation Limited v. 1201262 Ontario Inc. et al*., [2000] O.J. No. 981 (S.C.J.); *McCain Foods (Canada), a division of McCain Foods Ltd. v. Alberta (Environmental Appeal Board)*, [2000] A.J. No. 1075 (Q.B.); *Calgary (City) Electric System v. Weitmann*, [2001] A.J. No. 289 (Q.B.); *Amalgamated Transit Union, Local 1374 v. Saskatchewan Transportation Co.*, [2001] S.J. No. 484 (Q.B.); *Osmond v. Newfoundland (Workers' Compensation Commission)*, [2000] N.J. No. 211 (Newf. C.A.).

62 *Runnymede Development Corporation Limited v. 1201262 Ontario Inc. et al*., [2000] O.J. No. 981 (S.C.J.), at para. 29.

decision still take a "what have we got to lose" approach when assessing their prospects of success on judicial review."[63]

The time and expense that continue to be incurred in defining the proper standard of review reflect the difficulty inherent in applying the pragmatic and functional approach, particularly where there is no privative clause. Factors such as "relative expertise", "polycentricity" and "the nature of the question" are particularly elastic.

Some tribunals now receive greater deference on statutory appeal than others receive on like questions on judicial review. Because of the Supreme Court of Canada's direction that the standard of review can only be determined on an "issue specific" basis, the question must be argued afresh in each case a point well-illustrated by a number of judicial review decisions dealing with bodies such British Columbia's Freedom of Information and Privacy Commissioner and the Human Rights Tribunal.[64]

For example, the question of how to understand "relative expertise" – said to be "the most important factor" in many cases - has been less than clear. Some authorities understand the notion of "relative expertise" to favour deference only if the court is in a *worse* position than the tribunal vis-a-vis the issue on review. In other cases, the courts have accorded deference if the tribunal "is at least as well placed as a court to resolve the issue in dispute".[65] With respect to legal questions, some courts bristle against suggestions of deference, stating that "statutory interpretation is part of the regular work of the superior courts"[66], while others are more willing to

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63 Wade MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 Can. Bar Rev. 281 at 292.

64 See for example, *Dutton v. British Columbia (Human Rights Tribunal)*, [2001] B.C.J. 1794 (S.C.); *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 1030 (S.C.).

65 In favour of granting deference where the agency is at least as well placed to answer the question as the reviewing court, see Brown and Evans, Judicial Review of Administrative Action (2001), pp. 15-41 to 15-42; see also *Vancouver (City) Police Department v. British Columbia (Police Commission)*, [1999] B.C.J. No. 1796 (S.C.) at para. 34: "Having no greater expertise than the Commission in this regard, I consider that this factor supports a finding that the Commission be accorded a high degree of deference." By way of contrast, see *Aquasource v. Freedom of Information and Protection of Privacy Commissioner*, [1998] B.C.J. No. 1927 (C.A.) at para. 22: "As it is my view that this case is primarily one of statutory interpretation, I hold that the reviewing Court is as well equipped as the Commissioner to settle the meaning of s.12. This is the traditional role of the Court. The Commissioner possesses no special expertise in statutory interpretation which would justify according deference to his interpretation of a provision such as s. 12."

66 *Aquasource v. British Columbia (Freedom of Information and Protection of Privacy Commissioner*), *supra*, note 59, at paras. 22-24.

follow the *CUPE* approach and to grant deference to ambiguous legal questions without necessarily conceding judicial inferiority.[67] Robert Hawkins, whose writing has emphasized the link between curial deference and judicial understandings of tribunal reputation, has commented on the courts' treatment of this factor as follows:

> *In the final analysis, the court's theory for determining the expertise of administrative agencies, and so for determining the degree of deference that they will be shown, falls apart under its own subjectivity. In terms of measuring expertise, the focus on the "role of the tribunal" is too narrow an inquiry to yield a true appreciation of the agency's degree of specialization. In terms of the relevance of expertise, the description and mapping of the "nature of the question" is too much based on result-driven labeling to provide a satisfactory answer to the question of who does what best and why. In the result, the degree of judicial scrutiny of administrative decisions appears to depend on little more than judicial preference for certain tribunals and certain outcomes.*
>
> *However, this is only the court's announced theory of expertise and rationale for deference…. The board's public reputation for competence will influence a judge when this comparison of expertise is made. This link is made possible because expertise is a vague and impressionistic concept.*[68]

As for the direction to inquire into "the purpose of the Act as a whole and the provision in particular", lower courts are required to distinguish between "bipolar" disputes and those that are more properly referred to as "polycentric". "Polycentricity" - an unfortunate piece of jargon that has entered the Canadian jurisprudential lexicon – is a term introduced by the famous American scholar Lon Fuller. Fuller himself recognized the problematic nature of the term "polycentricity", observing that "concealed polycentric elements are probably present in almost all problems resolved by adjudication".[69] Many matters decided by administrative tribunals may involve bipolar dispute resolution, but *also* necessarily involve "large numbers of interlocking interests" (even if those interests are not represented at the hearing) or involve "open textured" legal standards. Determining the extent to which the "bipolar" versus "polycentric" elements in a dispute operate "for", "against" or "neutral" in respect of curial deference is not an easy exercise.

Finally, with respect to the nature of the question, the distinction between questions of fact and questions of law remains important, and since *Southam*, appears to turn on the judicial

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67 *Tin v. British Columbia (Ministry of Human Resources)*, [1998] B.C.J. No. 3273 (S.C.) at paras. 42-47.

68 Hawkins, "Reputational Review I: Expertise, Bias and Delay" (1998), 21 Dal. L.J. 5 at p. 24.

69 See Allison, "The Procedural Reason for Judicial Restraint" (1996), 42 Pub. Law 452 at p. 457.

assessment whether "a particular set of circumstances is apt to be of much interest to lawyers and judges in the future".[70]

As one commentator has noted, the application of these factors to individual cases can be "highly subjective".[71] It may indeed be said, without a hint of sarcasm, that the "pragmatic and functional approach" is often neither "pragmatic" nor "functional". As noted by Blake in *Administrative Law in Canada*: "The difficulty lies in ascertaining when each standard of review applies. Not even the courts are always certain when to apply which standard of review. Sometimes, after finding a tribunal's decision to be reasonable, a court comments that it also considers the interpretation to be correct."[72]

The 1997 paper of Mr. Justice Vancise, one of Canada's leading administrative law jurists, aptly outlines its message: "*Judicial Review – No Clearer Now than it Ever Was".* His 42 page paper closed with comment: "The view gets no better – the direction is not clear – one can only hope for inspiration".

For their part, Brown and Evans offer a more sympathetic assessment of the jurisprudence:

> *… a degree of uncertainty is inevitable in any analytical approach that stresses the importance of interpreting the text of the statute within the legal and regulatory contexts of the particular administrative scheme it governs. It is not possible, for example, to reduce the weight to be given to each of the various factors comprising the "pragmatic and functional analysis" to a single legal rule. Nor is it possible to provide a finely calibrated measure of an agency's expertise, or to define the degree of determinateness in statutory language. And given the kaleidoscope of administrative agencies, public programmes, legal powers, statutory mandates, individual interests and legislative language, close cases as to whether judicial review should be based on the standard of "correctness" or the less intense one of "rationality" necessarily call for an exercise of judgment that cannot be predetermined.*[73]

Brown and Evans are undoubtedly correct that one cannot eliminate the exercise of judgment in determining the proper standard of review. However, one does not observe commentators or courts advocating either the elimination of judgment or the creation of a "single legal rule". The question is not whether a degree of uncertainty is inevitable, but whether the degree of uncertainty that exists at present ought to be, or can be, limited.

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70 See *Pushpanathan*, *supra*, p. 214.

71 See Chaplin, "Who is best suited to decide?" (1994), 26 Ott. L. Rev. 321 at p. 129 (Q.L.).

72 Blake, Administrative Law in Canada (1997) (2nd ed.), p. 166.

73 Brown and Evans, Judicial Review of Administrative Action in Canada (2001) at p. 14-42.

For purposes of potential law reform, the passage from Brown and Evans begs the question whether, in a test whose stated purpose is to determine *legislative intent* regarding the standard of review, legislative clarity might meaningfully limit the time, expense and uncertainty that appear to be so pronounced where legislation is ambiguous. It would be paradoxical indeed if a clearer expression of legislative intent were incapable of reducing the complexity inherent in a test that the courts have repeatedly emphasized is designed to ascertain legislative intent.

In the end, for all the academic appeal of the pragmatic and functional approach, one is hard pressed to disagree with this assessment by David Jones, Q.C., which passage will likely resonate for both parties and courts who must grapple with this issue:

> *The result of many of the recent decisions of the Supreme Court [on the standard of review] is to increase uncertainty, thereby encouraging litigation, and putting a premium on the creativity and advocacy skills of counsel.*[74]

Of interest in this context is a recent British Columbia Court of Appeal decision that openly refused to engage in the "elaborate" process required by *Pushpanathan*, holding that it was unnecessary to do so based on the Board's "clear misinterpretation" of its powers.[75] The practical appeal of the court's approach is undeniable. At the same time, it raises legitimate questions about whether the law has become so cumbersome that it risks being ignored, thus undermining its very purpose.[76]

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74 Jones, "A Year 2000 Review of Standards of Review", Paper Prepared for Canadian Bar Association (BC) Administrative Law Branch at p. 24.

75 *(Minister of Forests) v. Canadian Forest Products Ltd.*, [2000] B.C.J. No. 1692 (C.A.).

76 As emphasized in *Domtar Inc. v. Quebec*, [1993] 2 S.C.R. 756, curial deference means that the tribunal is entitled to make its own decision, and not necessarily the decision the Court would have made. Applying "correctness" review in cases where deference ought to have been granted has two potentially undesirable consequences. First, if the Court overturns the tribunal, it may wrongly be substituting the Court's view for that of the tribunal. Second, even if the Court upholds the Tribunal, it may thereby "codify" that decision, thus fettering future tribunal panels from taking a different view of the matter. In *Domtar*, the Court made clear that conflicting tribunal decisions are not only permissible, but sometimes necessary: "So far as judicial review is concerned, the problem of inconsistency in decision-making by administrative tribunals cannot be separated from the decision-making autonomy, expertise and effectiveness of those tribunals…. If Canadian administrative law has been able to evolve to the point of recognizing that administrative tribunals have the authority to err within their area of expertise, I think that, by the same token, a lack of unanimity is the price to pay for the decision-making freedom and independence given to the members of these tribunals. Recognizing the existence of a conflict in decisions as an independent basis for judicial review would, in my opinion, constitute a serious undermining of those principles. This appears to me to be especially true as the administrative tribunals, like the legislature, have the power to resolve such conflicts themselves. The solution required by conflicting decisions among

Nor has the Supreme Court of Canada's own approach provided a consistent example to lower courts. The overwhelming majority of its decisions make clear that, as a matter of logic and principle, one must necessarily determine the standard of review before one engages in the review itself. So it was that the majority of the court in *Paccar* and subsequent cases rejected Sopinka J.'s approach in that case of applying a "correctness" test first, and asking whether deference was due only if the decision was "incorrect". To take this approach - which is tantamount to a Court of Appeal stating that it will only inquire into whether deference is due on questions of fact if it does not "agree" with the finding of fact - could easily undermine the very purpose of the inquiry and potentially fetter the tribunal.[77] Yet in 1997, only one year before *Pushpanathan*, the Supreme Court resurrected the Sopinka approach without explanation, stating: "I have concluded that the decision of the Board was correct. It is therefore not necessary to deal with the issue of the standard of deference owed to decisions of the Board."[78] It then took the opposite approach in *Pushpanathan* and all its subsequent decisions, even where it has applied a "correctness" test.

It must also be remembered that *determining* the standard of review is only the first step for the court. Next comes the task of *applying* the appropriate standard. In this respect, it is observed that the notion of a "spectrum" of review standards, together with the introduction of the "reasonableness *simpliciter*" test, has given rise to its own complications. Despite the Supreme Court of Canada's significant efforts to explain these different standards of review, courts continue to struggle, particularly with the distinction between the "patently unreasonable" test and the "reasonableness *simpliciter*" test. See for example the comments of Barry J. in *Miller v. Workers' Compensation Commission (Nfld.)*:

> *In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects at all.*[79]

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administrative tribunals thus remains a policy choice which, in the final analysis, should not be made by the courts."

77 *Ibid*.

78 *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.,* [1997] 1 S.C.R. 32, heading "K". The Court then went on, in *obiter dicta*, to address the standard of review, concluding that the standard was correctness.

79 [1997] N.J. No. 159 (Newf. T.D.) at para. 27.

See also the following recent comments of Reed J., an experienced administrative law justice of the Federal Court:

> *I am prepared to adopt the standard of reasonableness simpliciter as applicable to the visa officer's decision. I note that I have never been convinced that "patently unreasonable" differs in a significant way from "unreasonable". The word "patently" means clearly or obviously. If the unreasonableness of a decision is not clear or obvious, I do not see how that decision can be said to be unreasonable.*[80]

The above passages also call to mind the famous *Paccar* decision wherein there was universal agreement on the standard of review (patently unreasonable), with two judges stating the decision *was* patently unreasonable, two stating that it was *not* patently unreasonable and two stating that it was "correct"![81]

These passages, together with the practical experience of counsel and judges, call into legitimate question how helpful it is – once the conclusion has been reached that considerable deference is owed to the tribunal - to spend too much analytical effort on fine distinctions between whether the appropriate standard of review is "patently unreasonable", "unreasonable", or some other standard on the "spectrum" such as "nearly patently unreasonable". It has often been observed that where a court sees a clear injustice, it will tend to intervene regardless of how the standard is articulated. Indeed, the author has not located a single case where a court, having concluded that deference was due, stated that the outcome of the case turned on the distinction between the "unreasonableness *simpliciter*" test and the "patently unreasonable" test. The law reform consequences of these realities will be considered below.

6 WHAT EXPLAINS THE ADDED COMPLEXITY INVOLVED IN DETERMINING THE STANDARD OF REVIEW IN ADMINISTRATIVE LAW?

As has already been noted, resolving the standard of review is, outside administrative law, a familiar issue for the judiciary and is, by and large, coherent. As one reflects on Canadian law and the implications for potential law reform, one is driven to ask: what it is about administrative law that has posed such unique challenges to establishing a relatively simple and straightforward set of "standard of review" principles?

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80 *Hao v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 296 (T.D.) at para. 9.

81 *Caimaw v. Paccar of Canada Ltd*., [1989] 2 S.C.R. 983.

The answer is that, particularly over the past 20 years, reviewing courts have been asked to grant deference to administrative tribunals in areas and in ways that extend beyond the deference that appeal courts have traditionally granted to trial courts.

While a minor part of the difficulty (now largely resolved) has involved determining the test for reviewing findings of fact,[82] by far the most difficult and controversial area for the courts has been whether or not administrative tribunals ought to receive deference on questions of law. "Question of law" issues regularly arise in cases involving statutory interpretation, the application of facts to law and the review of discretion.

Our legal system is founded on the fundamental premise that the courts are the ultimate arbiters of the rule of law. It is a core function of courts in civil and criminal cases to assess and choose between competing conceptions of "the law" as tendered by the parties. Whether the dispute is founded upon statute or common law, and whether or not the problem is simple or complex, the courts have a duty to deliberate and produce a statement of "the law" so far as is necessary to resolve the dispute.

The law, as stated by lower courts, stands as "correct" unless and until reversed as "erroneous" by higher courts. As noted in Part 4 above, a key purpose of appellate courts is to ensure that lower courts correctly state the law. Where questions of law are concerned, there is a clear hierarchy as between appeal courts and lower courts. Because "error" is the test for appellate intervention on questions of law, all appellate argument is framed and debated accordingly. Indeed, for all the modern talk about "ambiguity", "policy" and "relativism" informing what we call "the law", the fact is that there are many cases in which reasonable observers will agree that

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82 On judicial review, the law is clear relief will not be granted based on an error of fact unless the tribunal has arrived at a key finding of fact without any evidence. The leading case is *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 at paras 42-43: "It has been held that a finding based on "no evidence" is patently unreasonable. However, it is clear that a court should not intervene where the evidence is simply insufficient. As Estey J., dissenting in part, noted in *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245, at p. 277: '. . . a decision without any evidence whatever in support is reviewable as being arbitrary; but on the other hand, insufficiency of evidence in the sense of appellate review is not jurisdictional, and while it may at one time have amounted to an error reviewable on the face of the record, in present day law and practice such error falls within the operational area of the statutory board, is included in the cryptic statement that the board has the right to be wrong within its jurisdiction, and hence is free from judicial review.' When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact": *Lester (W. W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, at p. 669 *per* McLachlin J. All these tests are strict…".

there is no better word than "error" to describe what happened at trial: the trial judge simply got it "wrong". And thank heavens, in those cases, for the Court of Appeal.

However, observers familiar the standard of review cases are often well aware that there are other cases in which one cannot dismiss these more "modern" concepts. When the Supreme Court of Canada considers a question of law and reverses the unanimous view of a provincial Court of Appeal, or splits 5-4 within its own ranks, more careful reflection is required about what it means to say that the lower court, or the dissenters, "erred". Is it not more accurate in such a case to observe that this particular question of law was not akin to resolving a math problem, that there was ambiguity, that the exercise may have involved difficult policy judgments and that, in the end, "correctness" is merely a shorthand way of saying that the majority on the highest court has to prevail because society requires certainty? Is there not a fair measure of truth in the saying that any particular majority of the Supreme Court of Canada has been "right" because it was "last" following the abolition of Privy Council appeals in 1949? An affirmative answer to these questions certainly appears to be consistent with the view of Mr. Justice Lambert who, while being doctrinally unique in articulating the notion of "correctness with appropriate deference"[83], authored this candid and insightful passage:

> *Reasons for judgment of the judges of this Court are described as "opinions" in the Court of Appeal Act. (See s. 21). Indeed judges often feel that they are not right or wrong, correct or incorrect, in a particular case. Rather, they form opinions. Almost all arguments about statutory interpretation in this Court, and indeed arguments about many other questions, consist of reasoned thinking supporting one view or the other. In the end, judges tend not to say that one argument is correct and the other incorrect. They say that they adopt, accept, or prefer one argument to another and give their opinions accordingly….*[84]

The fact that many questions of law do not give rise to a single, objectively "true" answer does not, of course, stop Courts of Appeal from reversing trial judges if they opine that the trial judge did not arrive at the best answer to a difficult question of law. Ambiguity in statutory interpretation cannot justify deference on questions of law as between an appeal court and a trial court. This is not because trial judges are inferior legal thinkers to Court of Appeal justices. Rather, for a Court of Appeal to defer to a trial judge's findings of law would subvert the legislative intent in creating a

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83 Lambert J.A.'s reference to a "correctness with deference" standard of review has spawned significant academic comment: see Falzon, "Self-Governing Professions: The Standard of Review" (CLE, June, 2001), pp. 9-12; Groberman, "Recent Developments in Administrative Law" (November, 2001); Lovett, "Deference within a Standard of Review of Correctness?" (2001), 59 The Advocate 703.

84 *Northwood Inc. v. British Columbia (Forest Practices Board*), *supra*, at para. 36.

Court of Appeal whose process, structure and appointments are all founded on that court having the right to articulate the law as it thinks best. As the author has written elsewhere:

> *For the Supreme Court of Canada, the "correctness" test is not so much a rejection of the ambiguity inherent in decision-making as a statement that the Court, as a matter of legislative intent and/or judicial policy, is entitled to finally resolve that ambiguity as it sees fit. Just as a Court of Appeal will not ignore the considered view of a trial judge on the law, the correctness test does not mean that the reviewing court ignores the considered view of the tribunal. Review for correctness does mean that, in the end, the reviewing Court takes full responsibility for resolving the ambiguity in the fashion that best promotes the law. Review for correctness is therefore a statement that the court's opinion about the best answer to a question decided by the tribunal is to prevail…*[85]

Administrative law cases have posed two fundamental challenges to the traditional notion that the court's opinion about the best answer to a question of law ought to prevail. First, legislation often includes clauses designed to discourage courts from assuming a traditional appellate role, and in favour of the tribunal taking responsibility for providing the "best" answer to legislative ambiguity. Second, where legislation is silent - and even where it appears to encourage the court to assume its traditional appellate role on questions of law - courts themselves have expressed concern about their own ability to provide a "better" answer to an ambiguous legal question than that of the tribunal. Both instances trigger the concept of "curial deference":

> *"Curial deference" means that the tribunal's opinion about the best answer is to prevail, unless it exceeds judicially defined tolerance limits. Within those tolerance limits, which may vary from issue to issue, deference is a statement that the tribunal has the right to resolve competing arguments and ambiguities as it thinks best. While this is sometimes couched as the "right to be wrong", it is more accurate to equate "deference" with autonomy – autonomy over and above that one might grant to a trial judge whose decision is challenged on appeal. The "right to be wrong" really, truly, means allowing a decision to stand even if a court does not think the tribunal got the "best" or "right" answer. Deference is thus not a matter of agreeing, but tolerating – with tolerance here flowing from the court's acceptance of tribunal specialization, deriving for example from legislative intent, statutory purpose, the need for finality or tribunal expertise. It is, at times, an uneasy sort of tolerance born of some pretty fundamental debates about the proper role and status of administrative tribunals, their relationship to courts, and the nature of tolerance itself when held by human beings whose values, philosophies and senses of justice may differ quite significantly from one to the next.*[86]

When it comes to deciding whether to grant deference on questions of law, it is no understatement to describe the tensions as being "fundamental". The following passage from the

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85 Falzon, "Challenging Decisions of Self-Governing Professions: The Standard of Review" (2001), *Self Governing Professions*, ch 4.2, p. 7 (Continuing Legal Education).

86 *Ibid*.

concurring judgment of Wilson J., Dickson C.J.C. and Lamer J. in *National Corn Growers* vividly expresses the case against adopting a traditional "appellate" posture on questions of law decided by agencies:

> *Canadian courts have struggled over time to move away from the picture that Dicey painted toward a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state. Part of this process has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise.*
>
> *Courts have also come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work. Evans et al. point out, for example, that "[o]ne of the most important developments in contemporary public law in Canada has been a growing acceptance by the courts of the idea that statutory provisions often do not yield a single, uniquely correct interpretation, but can be ambiguous or silent on a particular question, or couched in language that obviously invites the exercise of discretion": see Evans et al., op. cit., at p. 414. They then note:*
>
> > *In administrative law, judges have also been increasingly willing to concede that the specialist tribunal to which the legislature entrusted primary responsibility for the administration of a particular programme is often better equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language. Interpreting a statute in a way that promotes effective public policy and administration may depend more upon the understanding and insights of the front-line agency than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law. Administration and interpretation go hand in glove. [Emphasis added.]*
>
> *Evans et al. point out that as a result of this extensive string of decisions courts have increased agency autonomy in recent years. They emphasize that "judicial decisions have recognized that it is a distortion of our system of government to regard the courts as sitting at the apex of a hierarchy of bodies that are performing essentially the same tasks for which courts' procedures, personnel, knowledge, and approaches are perfectly apt": see Evans et al., op. cit., at p. 530.*
>
> *It is my view, then, that courts in this country have come to accept that there is a significant measure of truth to the comment of Professor Arthurs in "Protection against Judicial Review" (1983), 43 R. du B. 277, at p. 289:*
>
> > *There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that*

> *purpose, who strives to do so daily, and is well-aware of the effect upon the purpose of the various alternate interpretations….* [87]

These passages have never been rejected. The Supreme Court of Canada has frequently cited *National Corn Growers* in its "standard of review" decisions. Of particular note is a 1993 decision in which the majority quoted much of the above.[88] As recently as 1998, Chief Justice McLachlin put it this way in an article: "…I believe that one of the most intriguing aspects of the new Rule of Law is that it makes it possible for institutions other than courts to play key roles in maintaining it. It opens the door to the idea that courts do not necessarily have a monopoly on the values of reason and fairness"….[C]ontrary to Dicey's view that the courts' primary role is to constrain, limit and, if possible eliminate administrative power, the new Rule of Law allows courts to respect and advance the roles of administrative tribunals. The courts' role shifts from being a brute guardian of an artificial and restrictive Rule of Law to that of a partner….."[89]

These sorts of statements could have been utilized to support a single test of "reasonableness" or "rationality" for the review of any decision made by a tribunal, without qualification, and without carving out a special category for "legal" or "jurisdictional" error. However, in the absence of a full privative clause, it would be very wrong to believe that courts have been prepared to embark upon a general paradigm shift and assume a general posture of deference on questions of law. In the absence of a full privative clause, courts have tended to apply a practical presumption that questions of law are to be reviewed for correctness, unless a case for deference is made out on a tribunal by tribunal – and more recently, an issue by issue - basis.

What caused the courts to resist – in the absence of a full privative clause - a more literal and general application of the passage from *National Corn Growers*? A number of factors may be suggested.

First, and to be blunt, justices are not blind. They witness significant variation in the calibre of administrative tribunal decisions that come before them. They are well aware of the realities of an appointments process which, depending on the tribunal, may contain very few safeguards to ensure either merit or independence in decision-makers, which factors may influence the judicial perception of the particular tribunal.[90] In such a world, and in the absence of legislative reform,

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87 *National Corn Growers Assn v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324.

88 *Canada (Attorney General) v. PSAC* (1993), 101 D.L.R. (4th) 673 (S.C.C.).

89 *Supra,* note 9,at pp. 174-175.

90 Hawkins, *supra*, note 69 at pp.13-15.

generalized appeals to the "legislative ambiguity" in the "post-Dicey" world will do little to persuade a sophisticated justice that curial deference ought to be granted to a poorly written tribunal decision that itself seems to pay little attention to the questions of law respecting which deference is later sought. It has been wisely observed that "The presumption of deference is easier to support when the challenged decision is supported by reasons".[91]

Second, having recognized that a "reputational" component (both for the tribunals and for the courts) can be implicit in the question whether to grant deference to a tribunal on a question of law, there are many instances in which the refusal to grant deference is "nothing personal". The court's traditional role as being the ultimate arbiter of legal questions is deeply embedded in our legal system; a general diminution of the court's function of providing the "correct" answer on all questions of law instinctively rubs against the judicial (and to some extent, societal) grain. As colourfully noted by Holloway: "… when scholars carp at judicial resistance to modern administrative schemes, they should be aware that they are not simply fighting against the musings of an Oxford don of the last century, but rather against almost eight hundred years of legal evolution".[92] Rather than voluntarily cede their role as the presumptively "best" forum to resolve questions of law, Canadian courts have rightly looked for a clear expression of legislative intent on the question.

Third, in contrast to the reality that may have prevailed during other periods in our history, the fact is that today many superior court justices have a very sophisticated understanding of public law issues. In the absence of legislative intent emphasizing the importance of finality or tribunal expertise, it may be more difficult to argue that correctness review by the courts will systematically undermine legislative intent.

The tensions described above are at least as relevant to the creation of legislative policy as they are to judicial policy. Rather than leave these policy tensions for courts to resolve at large on a case-by-case basis according to a legislative intent that is often less than clear, legislators have the option of clearly expressing their intention regarding the proper role of the courts in reviewing decisions of the tribunals they create. While there will always be complicated cases because there are constitutional limits to be respected, there is room, within those limits, for legislators to make life significantly more straightforward for parties and for courts.

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91 Wade MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 Can. Bar Rev. 281 at p. 293.

92 Holloway, "A Sacred Right": Judicial Review of Administrative Action as a Cultural Phenomenon (1993), 22 Man. L.J. 28 at paras. 11 and 84.

Before discussing potential legislative options for British Columbia, it will be useful to consider how the issue has been addressed in other free and democratic societies, namely, England and the United States of America.

7 THE ENGLISH AND AMERICAN SOLUTIONS

England

The law of England has developed very differently from the law of Canada with respect to the standard of review. The leading cases are *Anisminic Limited v. Foreign Compensation Commission*, [1969] 2 A.C.147, *O'Reilly v. Mackman*, [1983] 2 A.C. 237 and *R. v. Hull University Visitor*, [1993] A.C. 682. These decisions have enabled the authors of de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed, 1995) to offer an enviably succinct statement of the law of judicial review in England:

> *..all power can be appropriately reviewed today under which might be described as the principles of lawful or legitimate administration. These principles enunciated as "grounds" of judicial review, were conveniently set out by Lord Diplock in the GCHQ case (a case itself involving review of prerogative power) as "legality", "procedural propriety" and "rationality". These requirements form a firm foundation upon which to review the public functions of modern administration and do not depend upon the limited notion of jurisdiction or vires in its narrow sense.*[93]

English jurisprudence categorically rejects the notion that curial deference ought ever to be granted to administrative tribunals on questions of law. In fact, the authors of de Smith – while not mentioning Canadian law on this point – offer a sobering criticism of "a purely pragmatic or functional" approach as being at once unprincipled and the source of both confusion and "a wilderness of single instances".[94]

Except in very limited circumstances, English courts have abandoned the task of seeking to distinguish between errors of law that are "jurisdictional" and those that are "non-jurisdictional". Their solution has been to hold that any material error of law constitutes jurisdictional error sufficient to nullify a decision. In England, not even a full privative clause will oust the courts' jurisdiction to review for correctness on a question of law:

> *In matters of public law, the role of the ordinary courts is of high constitutional importance. It is a function of the judiciary to determine the lawfulness of the*

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93 de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed, 1995) at p. 251.

94 *Ibid*, pp. 249-250.

> *acts and decisions and orders of the Executive, tribunals and other officials exercising public functions, and to afford protection to the rights of the citizens. Legislation which deprives them of these powers is inimical to the rule or supremacy of the law….*
>
> *The view is widely held that "the proper tribunals for the determination of legal disputes in this country are the courts, and they are the only tribunals which, by training and experience, and assisted by properly qualified advocates, are fitted for the task". [footnote omitted]*[95]

In *R. v. Hull University Visitor*, *supra*, the House of Lords put the matter this way:

> *In my judgment the decision in Anisminic …rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires. Thenceforward it was to be taken that Parliament had only conferred the decision making power on the basis that it was to be exercised on a correct legal basis: a misdirection in law in making the decision therefore rendered the decision ultra vires. Professor Wade considers that the true effect of the Anisminic case is still in doubt…. But in my judgment the decision of this House in O'Reilly v. Mackman … establishes the law in the sense that I have stated. Lord Diplock … stated that the decision in Anisminic:*
>
> > *'…has liberated English public law from the fetters that the courts had theretofore imposed on themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction. The breakthrough that Anisminic made was the recognition by the majority of the House that if a tribunal … mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported "determination", not being a "determination" within the meaning of the empowering legislation, was accordingly a nullity.'*
>
> *Therefore, I agree … that in general any error of law made by an administrative tribunal or inferior court in reading its decision can be quashed for error of law.*[96]

In sharp contrast to Canadian law, the English jurisprudence discloses no hint of existential "tension" about the proper role of the courts with respect to questions of law, even in the face of a full privative clause. American scholar Bernard Schwartz described *Anisminic* as "an unprecedented decision in a constitutional system whose foundation stone is Parliamentary

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95 *Ibid*, p. 231.

96 To similar effect, see *Boddington v. British Transport Police*, [1999] 2 A.C. 143 (H.L.).

supremacy".[97] The English cases concede that questions of law are not always simple to identify; however, once a question is so characterized, the proper standard of review is always correctness. One detects in the English cases the notion that deference on questions of law might be tantamount to what Lord Hewart described as "administrative lawlessness".[98]

Like questions of law, questions of procedural fairness are also reviewed on a correctness standard. Any other question – except perhaps questions arising under European Community law[99] - is subject to a standard of "rationality", as defined in *Associated Provincial Picture Houses Ltd. v. Wednesbury*, [1948] 1 K.B. 223 and the cases that have followed it.[100]

From a Canadian law reform perspective, there is no constitutional impediment to adopting the English approach by effectively "legislating" a correctness standard for all questions of law arising either with respect to specific tribunals, or generally on statutory appeal or judicial review to the courts.

The United States

In many respects, Canadian administrative law regarding the standard of review has more in common with United States law than it does with English law. A recent American law review article by Smith[101] suggests that the law of the United States with respect to the standard of review bears two striking similarities to Canadian law. First, American courts accept the notion of curial deference to administrative agencies on questions of law. Canadians will also take comfort in the second similarity - namely that in America, as in Canada, the law is less than clear about when such deference is appropriate.

Smith suggests that, until 1984, American courts essentially "pick" between two seemingly contradictory US Supreme Court decisions. One line of authority flowed from the US Supreme

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97 Schwartz, *Anisminic* and Activism – Preclusion Provisions in English Administrative Law" (1985), Admin. L.R. 33 at p. 33.

98 Lord Hewart, *The New Despotism* (1929), p. 6.

99 It has been suggested "there is a material difference between the *Wednesbury* and *Smith* grounds of review and the approach of proportionality applicable in respect of review where convention rights are at stake": *Reg. (Daly) v. Secretary of State for the Home Department*, [2001] 3 All E.R. 433, at paras. 26-27, per Lord Steyn.

100 See generally de Smith, *Judicial Review of Administrative Action*, ch 13.

101 Smith, "Comparing Federal Judicial Review of Administrative Court Decisions in the United States and Canada" (2000), 73 Temple L. Rev. 503. It should be noted that Mr. Smith's anaysis of Canadian law is somewhat incomplete. A review of the many of the cases and articles referred to in his paper, however, suggests that his review of American jurisprudence is much more sound.

Court's 1944 decision in *NLRB v. Hearst Publications*, where the court held that a Labour Board decision regarding whether specified persons were "employees" under the Act "is to be accepted if it has warrant in the record and a reasonable basis in law". A second line of authority would rely on the same court's decision only three years later in *Packard Motor Car Co. v. NLRB*, where the court reviewed a Board decision regarding whether a different group of persons were "employees" on a correctness standard without even referring to *Hearst* or the notion of deference.[102]

American scholars have suggested that the court's 1984 decision in *Chevron v. National Resources Defence Council* finally selected the "*Hearst* approach" over the "*Packard* approach". *Chevron* concerned judicial review of an Environmental Protection Agency decision interpreting the term "stationary source" in its enabling statute. In upholding the EPA's decision, the court announced an approach to judicial review that appears to be a unique mix of the present English and Canadian approaches:

> *When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute….*
>
> *Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency….. We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer….*[103]

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102 Smith, *supra*, at pp. 526-528.

103 *Chevron v. National Resources Defence Council*, 81 L. Ed. 2d 694 (1984) at pp. 702-04. It should be noted *Chevron* did not involve a privative clause. The governing *Administrative Procedures Act* is a federal statute expressly stating that "the reviewing court shall decide all relevant questions of law". In US law, the only references to privative clauses the author has located have arisen in state legislatures. One law review article suggests that, while the law is unclear on the point, the total preclusion of judicial review would be regarded by US courts as a violation of the Constitution: Schwartz, *Anisminic* and Activism – Preclusion Provisions in English Administrative Law" (1985), Admin. L.R. 33 at p. 35.

The *Chevron* test, which has elicited scholarly comment from numerous esteemed commentators[104], is an interesting mixture of Canadian law and English law. Like the law of Canada, the court in *Chevron* founds deference on the notion of legislative intent. Unlike Canadian law however, the test is not based on the general question of who the legislator felt was "better suited to answer the question", but rather: does the question, on the merits, have one clear answer? If the answer is yes, the court answers it. If the answer is "no", the matter is seen as one for the discretion of the agency, and deference is granted.[105] The court does not appear to trouble itself particularly with calibrating the exact "degree of deference owed".

In June, 2001, the US Supreme Court issued its decision in *United States v. Mead Corporation.*[106] Judging from the majority and dissenting opinions, *Mead* is the most significant American administrative law decision on the standard of review since *Chevron*. For purposes of this paper, *Mead* is of interest because it emphasizes again how the absence of clearly expressed legislative intent can create significant complications in the law. In *Mead*, the majority endorsed *Chevron*, but went on to conclude that deference may be appropriate even where Congress has not created an ambiguous provision. In a paragraph that bears striking similarity to Canadian decisions, the majority held:

> *When Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," Chevron, 467 U.S., at 843—844, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute…. But whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered. "[T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,' … "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer … ." The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position…. The approach has produced a*

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104 Two of whom went on to sit on the US Supreme Court: see Scalia, note 1 above; and Breyer, "Judicial Review of Questions of Law and Policy" (1986), 38 Admin. L.R. 363.

105 The American approach bears some similarity to the approach suggested by Sopinka J. in *Paccar*, and applied by the Court in *Dell Holdings* (1997), suggesting that the Court need only examine "deference" issues if the decision is "incorrect". That approach, however, has been rejected in the overwhelming majority of Canadian decisions.

106 *United States v. Mead Corporation* (June 18, 2001, unreported, Cornell Law Website).

> *spectrum of judicial responses, from great respect at one end ("substantial deference" to administrative construction), to near indifference at the other (interpretation advanced for the first time in a litigation brief)….*

For the majority, the above paragraph was necessary to recognize statutory diversity. The majority stated:

> *Although we all accept the position that the Judiciary should defer to at least some of this multifarious administrative action, we have to decide how to take account of the great range of its variety. If the primary objective is to simplify the judicial process of giving or withholding deference, then the diversity of statutes authorizing discretionary administrative action must be declared irrelevant or minimized. If, on the other hand, it is simply implausible that Congress intended such a broad range of statutory authority to produce only two varieties of administrative action, demanding either Chevron deference or none at all, then the breadth of the spectrum of possible agency action must be taken into account. Justice Scalia's first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety. This acceptance of the range of statutory variation has led the Court to recognize more than one variety of judicial deference, just as the Court has recognized a variety of indicators that Congress would expect Chevron deference.*

For his part, Justice Scalia noted that "we will be sorting out the consequences of the *Mead* doctrine … for years to come."

Mead reinforces this paper's theme that, while there will always be complications in the law regarding the standard of review, legislators can go a long way to reduce those complications – and thus reduce expense to parties and courts – if they make their intentions clear.

8 OPTIONS DISCUSSION

The first part of this paper devoted significant attention to the underpinnings, tensions and complications attendant on the law regarding the standard of review in administrative law. That discussion was not undertaken for mere academic interest. It has arisen from the very practical reality that each day in this province, lawyers are required to apply this complex area of law in providing advice to their clients. Courts, in turn, are required to apply it in resolving the disputes arising before them. It follows that a detailed examination and analysis of this area of Canadian law, together with the English and American authorities, has been a necessary precondition to any meaningful discussion of potential law reform. This has been all the more important for the purpose of this background paper, as the preferred choice of law reform may turn on whether one accepts as accurate the author's assessment of the law, or its complications.

Having discussed "the law" at length, the discussion naturally turns to whether or how legislators might intervene to reform this area of law. In outlining the alternatives discussed below, the author has striven to avoid "recommending" any particular option over any other. This said, it is recognized that – strive as one might to avoid it – the author's own views may, from time to time, creep into the manner in which alternatives are described or discussed. The author can only provide the reader with the assurance that he has done his best to ensure that the discussion is a broad, reasonable and helpful. One significant advantage to the Administrative Justice Review is its invitation to interested persons to offer other alternatives in the event that important options have been missed.

Several options for reform are discussed below. In keeping with the purpose of this paper, the following sections outline some of the underlying assumptions that might be cited to support the specific options. It is for the reader to decide whether those assumptions are in fact sufficiently supportable to justify the pursuit of any particular option. It is also important to note that there may well be additional options or sub-options for consideration, and it is expected that such options will be advanced and refined as the consultation phase of this process unfolds.

Lessons learned from the existing jurisprudence

Any reform process must be guided by a number of key lessons learned from the jurisprudence. The key lessons are set out below.

Need to respect constitutional limitations

The first lesson flows from the constitutional imperative. Subject to rejecting the notion of privative clauses and adopting the English approach of having all questions of law reviewed for correctness, the constitutional imperative means that legislation can never totally remedy the complexity in this area of the law. As a result of *Crevier* and its progeny, full privative clauses can never totally eliminate complex and divisive arguments about "jurisdictional" questions. However, experience has shown that privative clauses do generally simplify the resolution of these questions. Full privative clauses render it much more likely that courts will respect legislative intent favouring deference. Moreover, the presence of full privative clauses means that the courts have only two standards of review to choose from: "correctness" and the "patently unreasonable" test. The author is not aware of any case in which the Supreme Court of Canada, or any other court, has applied the "reasonableness *simpliciter*" test, or any other standard of review on the "spectrum" in cases involving a full privative clause.

Legislative intent best achieved when legislators really grapple with the issue, as part of overall institutional design

The second lesson is that simplifying the law for parties and courts entails a corresponding responsibility on legislators to confront for themselves, on a more regular basis than they do now, the very questions that courts presently struggle with: how much deference, if any, ought to granted to the administrative tribunal in question, and in what areas?

Just as courts struggle to answer these questions, legislators will not always answer them easily either. However, the decision by legislators to confront these issues carries significant benefits. It enhances democratic values by replacing the sometimes fictional search for legislative intent with a real and tangible expression of such intent. It simplifies the law for courts and litigants, thus reducing cost and complication, and making litigation more effective. Importantly, it also forces legislators to think more carefully about the fundamental purpose of the tribunal and the implications of that purpose for institutional design. Where legislators determine that an administrative tribunal serves "core values", it will often undermine those values to have the tribunal's decisions regularly and easily challenged in the courts. Thus, the decision about the standard of review will necessarily force legislators to think about critical antecedent questions such as whether that the tribunal has the jurisdiction, procedures, qualifications, expertise and appointments necessary to carry out its function effectively.

To be specific, legislators need to be direct and creative

The third lesson is that it is no longer sound to assume that legislative intent is adequately expressed by creating a "right of appeal" versus "judicial review", or by expressing the grounds of appeal or judicial review as "on a question of fact" or "question of law". Legislative drafting must be more creative, and more direct. While there are many possibilities, two such possibilities are given below:

> Example A: Privative clause
>
> (1) Decisions of the Board are final and conclusive, and are not open to judicial review unless they are patently unreasonable.
>
> Example B: Statutory right of appeal
>
> (1) A person aggrieved by a decision of the Board has a right of appeal on a question of law to the British Columbia Supreme Court/Court of Appeal
>
> (2) On appeal, the standard of review for questions of law alone is correctness; for all other questions, the standard of review is whether the decision is patently unreasonable.

Examples "A" and "B" would both break new ground in the enactment of tribunal legislation by actually spelling out the relevant standard of review for the related question.

Example "A" relies on the court's statement in *Pushpanathan* that the words "final and conclusive" should be given full privative effect. The reference to "patently unreasonable error" is included to place that intention beyond doubt. "Jurisdictional" review is not mentioned because the *Crevier* principle, which authorizes review for jurisdictional errors (including procedural fairness) on a correctness test, is necessarily implicit in the clause, and because the legislator is taken to know the principle from *CUPE* that courts ought not to be alert to brand as jurisdictional that which may doubtfully be so.

Example "B" discloses that legislation purporting to grant rights of appeal to courts on questions of law can never be drafted in such fashion as to eliminate the difficulty in seeking to distinguish between questions of law and questions of fact. To this extent, *Southam's* direction that courts must seek to distinguish between law and fact by asking whether "a particular set of circumstances is apt to be of much interest to lawyers and judges in the future" will always have to be confronted, just as it has to be confronted in England. This does not, however, make the reform exercise pointless. As Example B illustrates, once the court concludes that the question is not a question of law alone, the standard of review is legislatively decided. Instead of having to apply a lengthy pragmatic and functional approach to even determine the standard of review for the particular issue, and then being concerned with the "spectrum" of review standards, the legislator tells the court what standard is to be applied after the threshold has been crossed. Because of the difficulty many courts have in meaningfully distinguishing between "unreasonable" and "patently unreasonable" error, the more familiar "patently unreasonable" test was selected in the example above.

If legislators want to ensure deference, they should look beyond privative clauses alone

The final lesson learned from the jurisprudence is that, particularly where legislators desire the tribunals they create to be granted curial deference, they must give special attention to matters beyond the wording of the privative clause. While courts have not fully defined what they mean by "expertise", the cases support the position that legislative attention to matters such as the qualifications for board membership and the security of tenure of members will – over and above their functional purpose - reinforce the legislator's view that it should be exceptional to identify an issue as "jurisdictional". In some cases, "qualifications" are addressed in the tripartite structure of some tribunals, such as the Labour Relations Board or the British Columbia Review Board.

However, as the author has noted elsewhere,[107] legislators have begun to experiment with other interesting examples of such clauses. While somewhat broadly worded, section 15(2) of the BC Benefits (Appeals) Regulation provides ready inspiration for merit-based provisions in administrative statutes:

> 15(2) To be eligible for appointment to the board, a person must have
>
> (a) knowledge of the principles of administrative law, or
>
> (b) experience with income security programs, appeal or arbitration boards or commissions or with health, education or community programs.

This is not to say that matters such as qualifications and the appointments process are not critical issues in their own right. They are, however, particularly critical where the legislator intends to create a board whose decisions will discourage litigation.

No legislative reform?

Having discussed the possibility of law reform, it is important to emphasize that preserving the status quo is one option available to government. The "status quo", in this context, means declining to engage in any substantial law reform regarding the standard of review. Support for the status quo would be based on one or more of the following propositions:

- The law with respect to the standard of review in administrative law is not so complicated and uncertain as to warrant law reform.
- Even if the law with respect to the standard of review is exceptionally complicated and uncertain:
  - ♦ It does not result in sufficient problems in enough cases to justify law reform.
  - ♦ It is questionable whether even law reform can effectively reduce the complication in enough cases to make a difference.
  - ♦ The law's complexity is a good thing, and legislatures should not attempt to simplify what must in each case, and for each issue, be a "nuanced" application of the pragmatic and functional approach that can only properly be determined by the courts.

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[107] Falzon, *"Case Comment: Ocean Port Hotel v. British Columbia Liquor Appeal Board"* (November, 1999, Continuing Legal Education), p. 17.

- While the law is complex today, the standard of review will, over time, become sufficiently clear and settled with regard to a majority of tribunals, rendering academic the need for law reform.[108]

The case against this option would likely be based on one or more of the following propositions:

- The law is exceptionally complex and difficult to apply.
- While a certain degree of complexity will always be with us owing to the imperatives of s. 96 the *Constitution Act*, 1867, creative means do exist for legislators to meaningfully simplify the law for parties and courts.
- Any "benefits" of the nuanced approach are outweighed by the cost, unpredictability and complexity that presently attends the law where legislation is silent or ambiguous about the standard of review. Because the very purpose of the test is to determine legislative intent, it is desirable as a matter of policy for the legislature to express that intent clearly, even if the exercise becomes less "nuanced" than the "pragmatic and functional" approach.
- The problem is, in practice, a significant one for parties and courts. It is not likely to sort itself out in the near future.

The last point implicitly asks the question: how big a problem is this *really*? That very question has been raised by some tribunal members themselves, whose day-to-day concerns and priorities are often far removed from the question of the standard of review on any potential appeal or judicial review. With respect to this question, the Workplan setting the Terms of Reference for this paper states:

> *The standard of review is one of the most (if not the most) costly and time-consuming issue involved in preparing for, arguing and deciding a judicial review or statutory appeal to the Court. Each year, many thousands of hours of preparation time and court time are spent analyzing an extraordinarily large*

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108 This appears at least to be the preliminary position of the British Columbia Securities Commission, whose decisions have been subject to extensive litigation over the years, which litigation has produced what the Commission regards as a sound status quo with respect to its powers and the law regarding the standard of review of its decisions. The Securities Commission is one of those tribunals to which, despite the right of appeal, courts have granted curial deference in recognition of expertise. Whether legislative recognition of that expertise would be appropriate by way of a full privative clause may be a question the Commission wishes to address in any comment it provides on this report.

> *number of judicial authorities which have, as Professor Jones has noted, only "increased uncertainty" in the litigation process.*
>
> *In many hearings (and in many judgments), the standard of review occupies more time and expense than any other issue….*

That the standard of review is not of day-to-day concern to administrative tribunal members does not, of course, mean that tribunal chairs and their legal counsel will be unaware of the legal costs attendant on preparing for and arguing the issue. Nor does it necessarily reflect the difficulties that members of the Bar experience in providing legal advice on the question, or the difficulties courts experience in seeking to resolve it. Because the standard of review is a necessary threshold question in every case, it may be reasonable to conclude the large numbers of law review articles commenting on the issue, and the judicial decisions struggling with the question, reliably indicate that the issue is real, and widespread.

It will nonetheless be extremely useful to ascertain from those members of the Bar who practice in the area whether and to what extent they experience unnecessary complication in the law today, and to what extent they regard the reform of the law in this area as a legitimate issue for legislative action. Because this latter question cannot properly be answered without proper examination of the alternatives for law reform, it is to those alternatives that the discussion turns next.

The mechanics of reform

With respect to the mechanics of reform, three general approaches are possible. These include:

- Enact a generic provision creating one standard of review for all cases. For example, a "patently unreasonable" test for all decisions made by all tribunals, or alternatively a "correctness" test for all questions of law decided by tribunals, and "unreasonableness" for all other questions.
- Enact a generic provision which articulates the standard of review for various questions in a fashion that is presumptively inclusive of all tribunals, subject to exceptions listed in a schedule.
- Amend each specific statute, or only certain "problem" statutes, to clarify the standard of review applicable to that tribunal, or to specific decision-making powers of the tribunal.

The selection of any particular option may depend on one's preferred policy direction regarding standard of review legislation. The options are considered below, and various "mechanics" options are integrated with them to facilitate discussion.

Correctness review

On the English approach, no curial deference is granted on questions of law, but deference is granted on questions other than questions of law. A Canadian legislative example akin to the English approach is found in 672.78(1) of the *Criminal Code*, which governs appeals to the Court of Appeal from the British Columbia Review Board:

> 672.78(1) The court of appeal may allow an appeal against a disposition or placement decision and set aside any order made by a court or Review Board, where the Court of Appeal is of the opinion that:
>
> (a) it is unreasonable or unsupported by the evidence,
>
> (b) it is based on a wrong decision on a question of law, or
>
> (c) there was a miscarriage of justice.[109]

In contrast to the situation with privative clauses – where legislation can only go so far to insulate tribunals from judicial review - there is no constitutional impediment to inviting such review by legislating review for correctness. Depending on the policy orientation of the legislator, a number of options are possible, the first two of which may be framed either in a "pure" form, or as a proposition subject to exceptions:

- Wholesale adoption of the English approach: This model entails rejecting the position that curial deference on legal questions is appropriate, whether on judicial review or statutory appeal. It entails adopting the position of the English Courts that curial deference should never be granted on questions of law. While this approach would have the benefit of clarity and simplicity, its implicit rejection of arguments favouring tribunal specialization and finality would represent a radical departure from Canadian law.
- Focus on statutory rights of appeal: This model entails rejecting the Supreme Court of Canada's notion that a statutory right of appeal should be reduced only to a "factor" in determining of the standard of review. This approach would be based on the policy decision that because judicial review is always available, the decision to create a right of appeal to courts on a question of law must mean that the legislator rejected the notion of curial deference on questions of law, and invited courts to exercise their ordinary appellate role. This approach would have the disadvantage of requiring a wholesale review of statutes where such appeal rights are set out. However, its primary advantage

109 This provision, enacted in 1992 to govern appeals from Courts and Review Boards, is identical to s. 686(1)(a) which has long governed conviction appeals in criminal law. It has long been clear that this language means questions of law are reviewed for correctness, and curial deference is granted on all other questions.

would be in rationalizing and clarifying the law, and forcing the legislature to ask whether many existing appeal rights are in fact necessary.

- Tribunal by tribunal review: The third approach, which could well accompany the second, is to review all the tribunals covered by this review process, and to ask whether curial deference on legal questions decided by that tribunal ought to be granted even where the only remedy is judicial review. Thus, the legislator itself, rather than the court, would decide when the correctness test applies to questions of law based on the appropriate balance between factors such as the need for finality, the interests at stake in the legislative scheme, and the function and intended expertise of the board. On this approach, tribunals not entitled to deference on legal questions would be identified and their legislation clarified. Tribunals entitled to deference would be granted express privative protection, discussed below. Tribunals where the legislature prefers the judicial "status quo" would be unchanged.

- "Correctness" on questions other than questions of law: It has been necessarily implicit in this discussion that, as in the English approach, an administrative tribunal acting according to law will normally be granted deference on questions of fact, mixed fact and law, and discretion. The manner in which deference on such questions might be expressed will be discussed in the next section. The point here is that it is open to legislators to extend correctness review beyond questions of law. It is, for example, open to provide that "correctness" is the test for all questions of law and mixed law and fact, leaving deference only for questions of primary fact. It is also open to the legislator to provide for an appeal by way of rehearing or trial *de novo*, which are more common in administrative appeals than they are in judicial appeals.

Curial deference

The other alternative for legislators wishing to clarify the matter for parties and courts is to legislate deference, subject to the constitutional limitations discussed above.

Within constitutional constraints, the mechanics of legislating deference are relatively clear from the caselaw. First, a full privative clause is necessary to carry out legislative intent in favour of deference: "partial" privative language is not particularly helpful. Second, the legislator ought to give attention to matters beyond the privative clause that reinforce the specialized composition and qualifications of tribunal members. Third, legislators ought to consider plainly stating the standard of review by using the words "patently unreasonable", or whatever other language accurately expresses their intent.

As with correctness review, a number of possible legislative approaches are possible, including the following:

- Blanket deference in all cases, whether appeal or judicial review: Such an approach is possible. Realistically, however, it would blur beyond recognition the distinction between appeal and judicial review.
- Blanket deference on judicial review: Pursuant to this model, the legislature might enact a general statutory provision to this effect:

  > (1) A court shall not grant declaratory relief, or relief in the nature of *certiorari* unless the decision of a board or tribunal subject to this statute unless the decision is patently unreasonable.

  The argument in favour of this model would be as follows. First, the philosophical arguments advanced in the *National Corn Growers* judgment were correct: most legal questions do not have a uniquely correct answer, and it is consistent with the rule of law to allow administrative tribunals to answer all such questions, including legal questions, with finality, unless a court concludes they are irrational or incorrect on a question of jurisdiction. Second, since the very purpose of creating administrative tribunals is to act as an alternative to courts, it makes sense to discourage litigation, and to encourage parties to put their best foot forward at the tribunal level. Third, such a clause would greatly simplify the analysis for cases that do go to court because it would limit the occasions when questions will be labeled as "jurisdictional". Fourth, a full privative clause means that, analytically, only two possible standards of review to be concerned with, and the "correctness" standard will only apply to questions of jurisdiction. Fifth, a decided legislative policy in favour of deference will act as a beneficial discipline for legislators to ensure that (a) the tribunal is truly necessary; and (b) care will be taken to ensure that the tribunal's members are of the highest calibre. Sixth, boards which raise exceptional considerations could be excluded from this approach. Seventh, it could be limited to the administrative tribunals subject to the present review, thus excluding other tribunals, government ministries and local governments.

  Those opposing this model might do so on one of three grounds. First, based on the English approach, it might be argued on philosophical grounds that while certainty is a good thing, this sort of certainty is not: legislators ought to resist a legislative presumption that excludes courts from providing the best answers to legal questions arising before them. Second, it might be argued that certainty makes bad public policy - that it is simply not possible or desirable to legislate a single approach to the standard of review that

takes into account the diversity of tribunals, and we should therefore retain the status quo as articulated by the Supreme Court of Canada. Third, some might take the somewhat cynical view that, despite conscious and considered law reform requiring deference, and the legislator's reliance on the caution in *CUPE* against unnecessarily labeling questions as "jurisdictional", courts will ignore the caution in order to preserve the judicial role as much as possible.

- Tribunal by tribunal review: As discussed in relation to the "correctness" option above, the third alternative is to reject the idea of a "presumed" standard of review, and simply to proceed with a rigorous review of each of the boards captured by this review. The decision whether to enact a privative clause, a correctness clause or retain the status quo would be made, on a case by case basis, in conjunction with the decision whether to continue with or create statutory rights of appeal.

- Expressing curial deference in legislation: The examples used in this paper have utilized the patently unreasonable test, rather than the reasonableness *simpliciter* test, to express curial deference, whether the issue is one of fact, law or discretion. This has been done in recognition of the vagueness of the intermediate test, and in recognition of the difficulties that have attended application of the English *Wednesbury* test. This said, it is certainly open to the legislature to articulate a "reasonableness" standard of review if it believes the patently unreasonable test unduly limits the scope of review.

The special case of appeals directly to the Court of Appeal

No law reform discussion about whether and how to legislate the standard of review from decisions of administrative tribunals would be complete without consideration of those tribunals whose decisions are subject to appeal, but where the appeal is directly to the Court of Appeal rather than to the Supreme Court. Boards falling into this category include the Expropriation Compensation Board, the Securities Commission, and the Commercial Appeals Commission. Their decisions may be appealed directly to the Court of Appeal with leave of the court.[110] This is in contrast, for example, to decisions of the British Columbia Marketing Board and the Forest Appeals Commission, which may be appealed to Supreme Court as of right on a question of law, and beyond that to the Court of Appeal with leave.[111]

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110 *Expropriation Act*, R.S.B.C. 1996, c. 125, s. 28(1); *Securities Act*, R.S.B.C. 1996, c. 418, s. 167(1); *Commercial Appeals Commission Act*, R.S.B.C. 1996, c. 54, s. 20.

111 *Natural Products Marketing (B.C.) Act*, R.S.B.C. 1996, c. 330, s. 9; *Forest Practices Code of British Columbia Act,* R.S.B.C. 1996, c. 159, s. 14.

Appeals directly to the Court of Appeal occupy an interesting middle ground between an ordinary statutory appeal from a tribunal to the Supreme Court and judicial review protected by a privative clause. On one hand, such clauses may be seen as having partial "privative" effect since they contemplate only one level of review by a provincial superior court. While the constitutional right to seek judicial review in Supreme Court remains theoretically available in such cases, it is exceptional for a court to entertain such a Petition[112], even if a Court of Appeal refuses leave to appeal.[113] The requirement to grant leave to appeal may be seen as reinforcing this "privative" effect, though in practice leave is only refused for cases "without merit or moment".[114] On the other hand, the standard of review to be applied by the Court of Appeal once leave to appeal is granted is not entirely clear. There is conflicting case law as to whether the leave to appeal requirement itself is a factor in favour of or contrary to deference.[115] The scope of the court's role on appeal in reviewing questions of law, fact and discretion is not entirely clear.[116] Nor is the outcome of the pragmatic and functional approach particularly predictable in any particular case.

For purposes of law reform, two points arise from this discussion. First, the creation of appeals directly to the Court of Appeal from the decisions of certain administrative tribunals is an important tool for legislators to consider in setting where the finality of administrative tribunal decisions is important, but where significant interests may also be at stake. Second, the creation of such an appeal is only part of the equation: legislative clarification regarding the scope of appeal and the standard of review when leave to appeal is granted may at once assist courts and parties contending with these questions, and ensure that legislative intent is properly carried out.

A limitation period for judicial review

Appeal rights almost always arrive with limitation periods attached. Because the right of appeal is a creature of statute, a missed limitation period terminates the right of appeal. Even where

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112 *Delmas v. Vancouver Stock Exchange*, [1995] B.C.J. No. 2449 (C.A.).

113 Brown and Evans, *Judicial Review of Administrative Action in Canada* (2001) at pp. 3-15, 3-16.

114 *Delmas v. Vancouver Stock Exchange*, [1995] B.C.J. No. 2449 (C.A.).

115 In a 1998 decision dealing with the Expropriation Compensation Baord, the Court of Appeal relied on the requirement to obtain leave as being a factor in favour of curial deference: *Actton Petroleum Sales Ltd. v. British Columbia (Minister of Transportation and Highways),* [1998] B.C.J. No. 1244 (C.A.). However, this does not appear entirely consistent with the majority's view in *Pushpanathan* which stated that, to the extent that a Court's consideration of the issue is based on its "general importance" (which is, of course, one of the criteria for granting leave), the case for deference diminishes: (1998), 160 D.L.R. (4th) 193 (S.C.C.) at pp. 217-218.

legislation expressly grants discretion to the appellate body to accept "late" appeals, missing the appeal period is usually the source of significant heartache.

The seriousness with which courts take appellate limitation periods is reflected in the exhaustion of remedies doctrine in administrative law. While it is trite law that the existence of an adequate and available right of appeal to a tribunal or court will almost always lead a court to refuse relief on judicial review, such relief is also refused where the appeal period was not exercised and has now expired. As noted by Brown and Evans:

> *…where appeal rights exist, including an appeal by way of stated case, the courts have usually declined to grant a remedy pursuant to an application for judicial review, notwithstanding that the time for appeal may have expired or that leave to appeal has been denied.*[117]

Thus, where the legislature has created a statutory right of appeal to a court, the indirect result has been a "*de facto*" limitation period on the ability to challenge that decision in court. Like the leave to appeal requirements discussed in the previous section, this *de facto* limitation period may be seen as having a form of "privative effect". All of which leads to the question whether the legislator ought to consider more directly the question whether or to what extent limitation periods are appropriate for judicial review itself.

Brown and Evans observe that while there is older authority for the position that a limitation period, like a privative clause, is ineffective to oust the court's jurisdiction to grant judicial review, such a view would only prevail today where the limitation is so short as to deny the applicant a reasonable opportunity to challenge the validity of the administrative action in question.[118] Canadian and English authority appear to support this view.[119]

As a matter of constitutional law, legislators do have the option of creating a judicial review limitation period. Such a limitation period may be general or specific. Depending on the length of the limitation period, it may or may not recognize the court's right to grant leave to file a late application in exceptional circumstances.

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116 *Saunders Farms Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, [1995] B.C.J. No. 82 (C.A.) at paras. 31-39.

117 Brown and Evans, *supra*, pp. 3-15, 3-16.

118 Brown and Evans, *supra*, pp. 5-6, 5-7.

119 *Wainwright School Division No. 32 v. C.U.P.E. Local 1606*, [1987] A.J. No. 712 (Q.B.); de Smith, *Judicial Review of Administrative Action* (1995, 5th ed), p. 236.

There are two policy arguments against a limitation period for judicial review. First, British Columbia has never had a limitation period, and courts have been able to satisfactorily deal with cases involving delay and prejudice.[120] Second, public law issues are so important that the citizen's access to the court should not be constrained by a limitation period.

The policy arguments in favour of a limitation period for judicial review are as follows. First, the use of limitation periods to govern and organize the assertion of legal rights is a familiar feature of the legal system. Certainty and finality are just as important in public law cases than they are in the private law. Second, finality may be more important in public law cases, particularly where the Legislature created an administrative tribunal designed to deliver "final" decisions that allow parties to get on with their lives with minimum uncertainty following the tribunal's decision. Third, while the court has discretion to refuse relief based on delay or prejudice, this discretion may do little to address the inconvenience, uncertainty and expense of having to prevail upon the court's discretion to grant the remedy. This is particularly so given the view that courts ought not to refuse relief based on delay without first hearing the merits.[121] Finally, the law has long accepted "de facto" limitation periods arising from statutory appeals, and it ought not to be offensive to do directly that which can be achieved indirectly.

As with the other options under discussion in this paper, it is open to legislators to consider such legislation either generally or on a tribunal by tribunal basis, and to define any such limitation period according to whatever period of time appears fair and reasonable.

9 CONCLUSION

This paper has sought to achieve two goals. The first goal has been to describe and comment upon the law governing the standard of review in administrative law in a way that will assist readers in formulating opinions as to whether this subject matter justifies the call for law reform. The second has been to outline possible options for law reform, so as to advance dialogue and debate as to the content of any such reform. While significant effort has been made to ensure that this paper is as objective as possible, it is recognized that any discussion of law, and administrative law particularly, is inevitably informed by one's own perspectives and experiences. For this reason, an open and comprehensive debate about the issues and options set out in this

120 See *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, ss. 8(1), 11.

121 *MacLean v. University of British Columbia Appeal Board* (1993), 109 D.L.R. (4th) 569 (B.C.C.A.).

paper will be essential to informing public policy prior to the development of White Paper recommendations.

As noted in the quotation from Mr. Justice Scalia at the outset of this paper, such an exercise is not for the faint of heart. However, it is hoped that, whatever the outcome, such discussion will in some way assist everyone who is called upon to participate in the administrative justice system.